Google

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

HARVARD LAW LIBRARY

Feb. 20.

25

REPORTS

OF

CASES AT LAW AND IN CHANCERY

DETERMINED IN THE

SUPREME COURT

OF

COLORADO TERRITORY

TO THE PRESENT TIME.

By MOSES HALLETT.

PRINTED FOR THE REPORTER.

DENVER, COL.
SOLD BY S. A. GRANT & CO.
BOOKSELLERS AND STATIONERS.
1872.

Entered, according to act of Congress, in the year eighteen hundred and seventy-two,
BY MOSES HALLETT,
In the office of the Librarian of Congress, at Washington.

Rec. July 24, 1873

WEED, PARSONS AND COMPANY,
PRINTERS AND STEREOTYPERS,
ALBANY, N. Y.

I HAVE endeavored to give place in this volume to every thing which may be necessary to a correct understanding of the opinions of the court and to nothing more. The briefs of counsel are omitted, and where the opinion contains a sufficient statement of facts I have not thought it necessary to explain the omission of such statement by the reporter. All dissenting opinions will be found in their connection, and when the bench was not full the fact is noted. Several early cases of little interest to the profession, and some in which the facts cannot be obtained, are not reported. The number of unreported cases does not exceed ten, according to the best information I can get. It has been difficult to limit the cost of this publication to the amount which may probably be obtained from sales of it, and if any thing has been omitted from these pages which should have a place therein, I trust that the omission will be excused in view of the necessity of the occasion.

M. H.

DECEMBER, 1872.

JUSTICES OF THE SUPREME COURT

TO THE PRESENT TIME.

Names.	Date of Commission.	Expiration of Term.
CHIEF JUSTICES.		
Benj. F. Hall	March 25, 1861	*
Stephen S. Harding	July 10, 1863	December 31, 1865.
Moses Hallett	April 10, 1866	†
ASSOCIATE JUSTICES.		
Chas. Lee Armour	March 28, 1861	March 28, 1865.
Allan A. Bradford	June 6, 1862	March 3, 1865.
Charles F. Holly	June 10, 1865	May 25, 1866.
Wm. H. Gale	June 10, 1865	July 19, 1866.
Wm. R. Gorsline	June 18, 1866	June 18, 1870.
Christian S. Eyster	August 11, 1866 ‡	March 2, 1871.
James B. Belford	June 17, 1870	
Ebenezer T. Wells	February 8, 1871 §	

JUSTICES OF THE COURT.

At January Term, 1864.

STEPHEN S. HARDING, C. J.,
CHAS. LEE ARMOUR, J.,
ALLAN A. BRADFORD, J.

During the Terms of 1867, '68 *and* '69.

MOSES HALLETT, C. J.,
CHRISTIAN S. EYSTER, J.,
WM. R. GORSLINE, J.

During July Term, 1870, *and February Term*, 1871, *until March* 3, 1871.

MOSES HALLETT, C. J.,
CHRISTIAN S. EYSTER, J.,
JAMES B. BELFORD, J.

After March 3, 1871. ‖

MOSES HALLETT, C. J.,
JAMES B. BELFORD, J.,
EBENEZER T. WELLS, J.

---

* I am unable to ascertain the date of Chief Justice HALL'S resignation.

† Re-appointed April 6, 1870.

‡ Congress was not in session at this time. The appointment was confirmed by the Senate and another commission issued March 2, 1867.

§ To take effect March 2, 1871.

‖ The cases decided after Mr. Justice WELLS became a member of the court may be found from page 317 to the end of the volume.

TABLE OF CASES REPORTED.

	PAGE.
Allen vs. Eldridge	287
Anderson vs. Sloan	33
Anderson et al. vs. Sloan, adm'r	484
Andrews vs. Loveland et al	8
Andrews et al., Sears vs	88
Andre vs. Jones	489
Angela, Mills et ux. vs	334
Anthony vs. Estabrook	75
Armor vs. Fisk	148
Armor vs. Lyon et al	7
Barber, Cheney vs	256
Barber, Cheney vs	73
Barber, Crary vs	172
Barry vs. Hart et al	246
Binder, Roach vs	322
Board of Co. Commissioners vs. Koons et al	160
Bradford, Weir vs	14
Brown et al., Ford et al. vs	265
Brocker, Wise et al. vs	550
Butterfield, Cody vs	377
Carothers vs. Jones	196
Carruthers, Jones vs	291
Carpenter, Longan vs	205
Cass vs. Davis	43
Central City Water Company vs. Kimber et al	475
Cheney vs. Barber	256
Cheney vs. Barber	73
Christian vs. Tucker	49
Cisson, Smith et al. vs	29
City of Central, Deitz vs	323
City of Denver vs. Kent et al	336
Clark vs. Russell	52
Clayton vs. Smith	95
Clarke, Scudder vs	192
Clements, Sullivan et al. vs	261
Clements vs. Hahn	490
Cody vs. Butterfield	377
Cody vs. Raynaud	272
Cofield vs. McClellan et al	370
C. G. & S. Mining Co. et al. vs. Root,	374
Consolidated Gregory Co. vs. Raber,	511
Cook vs. Hughes	51
Crandall vs. Sterling Gold Mining Co	106
Crary vs. Barber	172
Craig, Doss vs	177
Creighton vs. Kerr et al	509
Crew, Dorsett vs	18
Cunningham, Murphy vs	467
Dailey, Holladay vs	460
Daniels, Litchfield vs	268
Davis, Cass vs	43
Deitsch vs. Wiggins et al	299
Deitz vs. City of Central	323
Doane et al. vs. Glenn et al	417
Doane et al. vs. Glenn et al	454
Doane et al. vs. Glenn et al	495
Donnelly, Peddie vs	421
Dorsett vs. Crew	18
Doss vs. Craig	177
Dougherty vs. The People	514
Dunn, Gardner vs	1
Dunton vs. Montoyo	99
Eldridge, Allen vs	287
Erskin, School District No. 8, Jefferson Co. vs	367
Eastabrook, Anthony vs	75
Farnum vs. United States	309
Ferris, Hirsch vs	402
Field et al., Wilcox et al. vs	3
Fisk, Armor vs	148
Fitzgerald vs. The People	56
Ford Gold Mining Co. vs. Langford,	62
Ford et al. vs. Brown et al	265
Foster vs. The People	298
Franklin vs. United States	35
Freas vs. Townsend	36

	PAGE.
Gallup et al. vs. Wilder et al.....	264
Gallup et al. vs. Wilder et al.....	293
Gardner vs. Dunn.....	1
Gibson vs. Smith.....	7
Gile, Patterson vs.....	200
Gile vs. The People.....	60
Gilpin vs. Watts.....	479
Glenn et al., Doane et al. vs	417
Glenn et al., Doane et al. vs	495
Glenn et al., Doane et al. vs	454
Glines et al., Matthews et al. vs....	472
Good vs. Martin.....	165
Good et al. vs. Martin.....	406
Graham, Western Union Telegraph Company vs.....	182
Graham, Western Union Telegraph Company vs.....	230
Grill et al., Langley et al. vs.....	71
Grimes, Malony vs.....	111
Grimes et al., Woodbury et al. vs..	100
Hahn, Watson v s.....	385
Hahn, Watson vs	494
Hahn, Turner vs.....	23
Hahn, Clements vs.....	490
Hallett, The People ex rel. Baxter et al. vs	352
Hanson, Thackaray vs.....	365
Hart et al.. Berry vs.....	246
Hare, Worrall vs	91
Haskins vs. Tucker et al.....	263
Hax et al. vs. Leis.....	171
Hax et al. vs. Leis.....	187
Hill vs. The People.....	436
Hirsch vs. Ferris.....	402
Hoehne vs. Trugillo.....	161
Hoehne vs. Rupear.....	405
Holladay vs. Dailey.....	460
Howard vs. Sherwood	117
Hodgson, Leis vs.....	393
Hughes, Cook vs	51
Jones et al. vs. Stephens.....	67
Jones vs. Carruthers.....	291
Jones, Carothers vs.....	196
Jones, Andre vs.....	489
Kansas Pacific Railway, Powrie vs.	529
Keith et al., Orman et al. vs.....	81
Keith et al., Orman et al. vs.....	82
Keller, adm'r., Klopfer vs	410
Kent et al., City of Denver vs	336
Kerr et al., Creighton vs.....	509
Kinear Adm., vs. Tucker et al.....	74
Kinney vs. Williams.....	191
Kimber et al., Central City Water Company vs.....	475
Klopper vs. Keller, adm'r	410
Koons et al., Board of County Commissioners vs.....	160
Kretschmer, Shallcross vs.....	493
Kurtz vs. Simonton.....	70
Kurtze vs. McCord.....	164
Langford, Ford Gold Mining Company vs.....	62
Langley et al. vs. Grill et al.....	71
Lee vs. Ralston	5
Leis, Hax et al. vs.....	171
Leis, Hax et al. vs	187
Leis vs. Hodgson.....	393
Lilley et al., Sopris vs.....	266
Lincoln and Strickler, Tiger vs....	394
Litchfield vs. Daniels.....	268
Longan vs. Carpenter.....	205
Loveland et al., Andrews vs	8
Loveland vs. Sears.....	194
Loveland vs. Sears.....	433
Luttrell, Paul vs.....	317
Luttrell, Paul vs.....	491
Lynn vs. Merricle.....	3
Lyon et al., Armor vs	7
Machette vs. Wanless.....	225
Martin, Good et al. vs	406
Martin, Good vs	165
Matthews et al. vs. Glines et al	472
McClellan et al., Cofield vs.....	370
McCord, Kurtze vs.....	164
McNasser vs. Sherry.....	12
Malony vs. Grimes.....	111
Mericle, Lynn vs.....	3
Mills et ux. vs. Angela.....	334
Montoyo, Dunton vs.....	99
Murdock vs. Townsend.....	38
Murphy vs. Cunningham	467
Myers, The People vs.....	508
Nachtrieb vs. Stoner	423
Nichols, Yunker vs.....	551
Norrid, Shipton et al. vs.....	404
Orman et al. vs. Keith et al.....	81
Orman et al. vs. Keith et al.....	82
Patterson vs. Gile.....	200

	PAGE.
Paton vs. The People	77
Paul vs.Luttrell	317
Paul vs. Luttrell	491
Peddie vs. Donnelly	421
Phelps vs. Spruance	414
Pollock et al. vs. The People	83
Powrie vs. Kansas Pacific Railway,	529
Raber, Consolidated Gregory Co. vs	511
Ralston, Lee vs	5
Raynaud, Cody vs	272
Remington et al. vs. Smith	58
Reynolds vs. The People	179
Roach vs.Binder	322
Rocky Mountain National Bank, Tannatt vs	278
Rocky Mountain National Bank, Union Gold Mining Co. vs	531
Root et al., C. G. & S. Mining Co. et al. vs	374
Rupear, Hoehne vs	405
Russell, Clark vs	52
Salomon, Smith vs	176
School District No. 8 Jefferson Co. vs. Erskin	367
Scudder vs. Clarke	192
Sears, Loveland vs	194
Sears, Loveland vs	433
Sears vs. Andrews et al	88
Shallcross vs. Kretschmer	493
Sherry, McNasser vs	12
Sherwood, Howard vs	117
Shipton et al. vs. Norrid	404
Simonton, Kurtz vs	70
Simonton, Todd et al. vs	54
Sloan, Anderson vs	33
Sloan, adm'r., Anderson et al. vs	484
Smith, Clayton vs	95
Smith, Gibson vs	7
Smith, Remington et al. vs	58
Smith, Salomon vs	176
Smith vs. The People	121
Smith et al. vs. Cisson	29
Sopris vs. Truax	89
Sopris vs. Lilley et al	266
Sopris vs. Webster	507
Spruance, Phelps vs	414
Sterling Gold Mining Co., Crandall vs	106
Stevens, Jones et al. vs	67
Stoner, Nachtrieb vs	423
Sullivan et al. vs. Clements	261
Thackaray vs. Hanson	365
Tannatt vs. Rocky Mountain National Bank	278
The People, Fitzgerald vs	56
The People, Foster vs	293
The People, Gile vs	60
The People, Paton vs	77
The People, Reynolds vs	179
The People ex rel. Baxter et al. vs. Hallett	352
The People vs. Myers	508
The People, Smith vs	121
The People, Hill vs	426
The People, Dougherty vs	514
The People, Pollock et al. vs	83
Tiger vs. Lincoln & Strickler	394
Todd et al. vs. Simonton	54
Townsend, Murdock vs	33
Townsend et al. v . Wild et al	10
Townsend, Freas vs	86
Truax, Sopris vs	89
Trugillo, Hoehne vs	161
Tucker, Christian vs	49
Tucker et al., Haskins vs	263
Tucker et al., Kinear, Adm'r, vs	74
Turner vs. Hahn	23
Union Gold Mining Co. vs. Rocky Mountain National Bank	531
United States, Farnum vs	309
United States, Franklin vs	35
Wanless, Machette vs	225
Watson vs. Hahn	385
Watson vs. Hahn	494
Watts, Gilpin vs	479
Webster, Sopris vs	407
Weir vs. Bradford	14
Western Union Telegraph Co. vs. Graham	182
Western Union Telegraph Co. vs. Graham	230
Wiggins et al., Deitsch vs	299
Wilcox et al. vs. Field et al	3
Wilder et al., Gallup et al. vs	264
Wilder et al., Gallup et al. vs	293
Wild et al., Townsend et al. vs	10
Williams vs. Kinney	191
Wise et al. vs. Brooker	550
Woodbury et al. vs. Grimes et al	100
Worrall vs. Hare	91
Yunker vs. Nichols	551

TABLE OF CASES CITED.

	PAGE.
Adams vs. Miller, 12 Ill. 27	330
Adkins vs. Brewer, 3 Cow. 206	429
Adams vs. Grant's adm'r, 2 How. 279	459
Alder vs. Heighley, 16 M. & W. 117	245
Allen vs. McKean, 1 Sumner, 317	361
Alhers vs. Whiting, 1 Story, 310	456
Am. Ins. Co. vs. Canter, 1 Peters, 511	39, 181
Ameriscoggin Bridge vs. Bragg, 11 N. H. 106	560
Anderson vs. Brown, 9 Mo. 638	173
Anthony vs. Gilbert, 4 Blackf. 348,	308
Armstrong vs. Mock, 17 Ill. 166	31
Arnold et al. vs. Sanford, 14 Johns. 417	73
Archer vs. Ross, 2 Scam. 308	412
Austin vs. Murray, 16 Pick. 121	327
Ballou vs. Talbott, 16 Mass. 461	283
Barlow vs. Cong. Society, 3 Allen, 460, 461	283, 287
Bailey vs. Hardy, 12 Ill. 459	381
Bank U. S. vs. Tyler, 4 Peters, 366,	392
Barkeloo vs. Randall, 4 Blackf. 422,	424
Ballance vs. Leonard, 37 Ill. 43	495
Bank of Kentucky vs Ashley, 2 Pet. 327	514
Beals vs. Allen, 18 Johns. 365	255
Bendix vs. Wakeman, 12 M. & W. 97	290
Bestor vs. Walker, 4 Gilm. 3	390
Beebee vs. Russell, 19 How. 283	418
Bently vs. Gregory, 17 Iowa	561
Birney vs. N. Y. W. Tel. Co., 18 Md. 341	236
Bivins vs. State, 6 Eng. 455	446
Blair et al. vs. Chamberlain et al., 39 Ill. 521	116
Blanchard vs. Ely, 21 Wend. 342	240
Bland vs. People, 3 Scam. 365	524
Bond et al. vs. The People, 39 Ill. 26	91, 135
Boggs vs. Bindskoff et al., 23 Ill. 67,	94
Booth vs. Rees, 26 Ill. 48	432
Brewster vs. Wakefield, 22 How. 118	52
Bronson vs. Kinzie, 1 How. 311	106
Brennan et al. vs. The People, 15 Ill. 511	138
Bradley vs. Powers, 7 Cow. 330	305
Brooks vs. Whitworth, 1 Mad. Ch. 58	346
Brown et al. vs. Smith et al., 24 Ill. 196	408
Brown vs. Langley, 4 M. & Gr. 473,	423
Burns vs. Henderson, 20 Ill. 264	46
Butler vs. Palmer, 1 Hill, 324	54
Burrow vs. Blair, 12 Ind. 371	457
Buckholder vs. Edwards, 16 Ga. 593,	565
Campbell vs. Jones, 6 Term R. 570,	157
Carpenter vs. Snelling, 97 Mass. 452	204
Camp vs. West Union Tel. Co., 1 Metc. (Ky.) 166	236
Corgan vs. Frew, 39 Ill. 31	388
Campbell vs. Boyreau, 21 How. 226,	415
Cable vs. Smoyer, 19 Ind. 202	471
Culver vs. Ashley, 1 Am. L. C. 719,	547
Capers vs. Wilson, 3 McCord, 170	569
Chickering vs. Fails, 26 Ill. 519	174
Chamberlin vs. Reed, 16 Cal. 209	190
Chicago & R. I. R. R. Co. vs. Ward, 16 Ill. 522	387
City of Detroit vs. Jackson, 1 Doug. 115	280
City of Boston vs. Shaw, 1 Metc. 130	327
City of Pekin vs. Smelzel, 21 Ill. 465	328
City of Burlington vs. Keller, 17 Iowa, 369	328

	PAGE.
Clem vs. Com., 2 Metc. (Ky.) 10...	143
Clapp vs. Rice, 13 Gray, 403.....	170
Clay vs. The State, 4 Kan. 49.....	181
Clark vs. Beach, 6 Conn. 159	222
Clark vs. Lewis, 35 Ill. 423.....	322
Clark vs. Roberts, Breese, 285.....	429
Clark vs. Wilson, 15 Vesey, 317....	483
Clagget vs. Blanchard, 8 Dana, 43..	488
Clifford vs. Keating, 3 Scam. 250 ..	495
Corbin vs. Hudson R. R. Co., 17 N. Y. 131	76
Conkey vs. Hart, 14 N. Y. 22	106
Com. vs. Child, 10 Pick. 252.....	145
Co. of Knox vs. Adams, 22 Ill. 175,	161
Co. of Randolph vs. Ralls, 18 Ill. 29,	165
Cook vs. Sanford, 3 Dana.....	284
Com. vs. Newell, 7 Mass. 244.....	296
Com. vs. Hart, 11 Cush. 130	297
Co. Commissioners vs. Robertson, 5 Gilm. 563.....	330
Com. vs. Adams, 3 Metc. (Ky.) 6..	360
Coffin vs. Evansville & C. R. R. Co., 7 Ind. 413	409
Cooper vs. Reynolds, 10 Wall. 320,	430
Corser vs. Paul, 41 N. H. 24	547
Corbet vs. Norcron, 35 N. H. 115..	563
Cook vs. Nearing, 27 N. Y. 306....	569
Croft vs. Bannister, 9 Wis. 509....	222
Crichton vs. The People, 6 Parker, C. R. 370.....	313, 516
Crabtree vs. Green, 36 Ill. 278.... .	409
Cunningham vs. Loomis et al., 17 Ill. 555.....	10
Curry vs. Pringh, 11 Johns. 444....	429
Curtis vs. The State, 2 Ind. 618....	516
Dana et al. vs. Adams, 13 Ill. 693...	68
Davis vs. Talcott, 14 Barb. 611.....	245
Davis vs. Bush, 4 Blackf. 330.....	253
Damon vs. Bryant, 2 Pick. 411..254,	305
Dalton vs. Midland R. Co., 76 E. C. L. 474.....	290
Davis vs. Bush, 4 Blackf. 330..305,	429
Dean vs. Comstock, 32 Ill. 173.....	262
De Witt vs. Wallin, 4 Seld. 571....	284
De Witt vs. Walton, 9 N. Y. 572...	287
Dickson vs. The People, 17 Ill. 191,	85
Donnolly vs. The People, 11 Ill. 65..	85
Douglass vs. Park et al., 43 Ill. 146,	174
Downer vs. Collin, 26 Ala. 591.....	284
Dox et al. vs. Dey, 3 Wend. 357...	408
Driggs vs. Dwight, 17 Wend. 71....	240
Dutton vs. Joes, 5 Mich. 519.....	222
Dunham vs. Rochester, 5 Cow. 462,	327
Duvall vs. Craig, 2 Wheat. 45.....	414
Easton et al. vs. Altum, 1 Scam. 250,	65
Eaton vs. Graham, 11 Ill. 620.....	331
Edwards vs. Vandermark, 13 Ill. 633,	331
Ellis vs. Am. Tel. Co. 13 Allen, 234,	238
Eldridge vs. Rowe, 2 Gilm. 91.....	277
Evans vs. Gee, 11 Pet. 85.....	488
Fairlee vs. Hastings. 10 Vesey, 123,	76
Falk vs The People, 42 Ill. 331.....	133
Fearn vs. Filica, 7 M. & G. 513.....	321
Farr vs. Newman, 4 D. & E. 636..	563
Fellows vs. Fellows, 4 Cow. 680...	347
Fiske vs. Eldridge, 12 Gray, 474....	285
Fleece vs. Russell, 13 Ill. 32.....	9
Fletcher vs. Taylieur, 33 Eng. L. & Eq. 187.....	245
Fox vs. Harding, 7 Cush. 522.....	245
Fowle vs. Wyman, Quincy's (Mass.) 336	262
Forgay vs. Conrad, 6 How. 201....	418
Foster vs. Browning, 4 R. I. 47....	558
Foster vs. N. H. & N. Co., 23 Conn. 228.....	558
Franey vs. True, 26 Ill. 184.....	51
Freeman vs Clute, 3 Barb. 426.....	240
Free vs. Hawkins, 8 Taunt. 92.....	423
Franklin vs. Tallmadge, 3 Johns. 84,	502
Fulton Bk. vs. N. Y. & Sharon Canal Co., 4 Paige, 137	546
Gardner vs. The People, 20 Ill. 430,	80
Gaters vs. Madely, 6 M. & W. 422,	290
Gauche vs. Mayer, 27 Ill. 134.....	427
Gay vs. Smith, 38 N. H. 171.....	427
Ginnis vs. Martin, 10 Iowa, 347....	502
Glassock vs. Lyons, 20 Ind. 2.....	361
Greenup vs. Stoker, 3 Gilm. 219...	28
Griffin vs. Colver, 16 N. Y. 490....	241
Gruman vs. Raymond, 1 Conn. 40.	429
Greenvault vs. Farmers' Bank, 2 Doug. 498.....	429
Graves vs. The State, 12 Wis. 593	451
Gray vs. Cooper, 5 Ind. 506.....	487
Hays vs. Caldwell et al., 5 Gilm. 33,	9
Harrison vs. Doyle, 11 Wis. 283...	46
Harrison vs. The State, 9 Mo. 526,	80
Hawks vs. Crofton, 2 Burr. 698....	89
Halsey vs. Hurd et al., 6 McL. 14,	174

PAGE.

Hayden et al. vs. Turnpike Co., 10 Mass. 403..... 186
Harrison vs. B'k of K'y, 3 J. J. Marsh. 376..... 190
Harper vs. Clark, 17 Ohio St. 190.. 201
Hallock vs. Jaudin, 34 Cal. 175..... 201
Hamilton vs. Dewey, 22 Ill. 490... 277
Harrington vs. McNaughton, 5 Taunt. 232..... ... 321
Harman vs. Thornton, 2 Scam. 351, 399
Harriman vs. The State, 2 G. Greene, 270..... 411
Hance vs. Miller, 21 Ill. 637..... 471
Harris vs. Runnels, 12 How. 79.... 543
Hess vs. The State of Ohio, 5 Ham. 12..... 62
Henthorn vs. Doe, 1 Blackf. 160... 109
Hearn vs. Rogers, 9 B. & C. 577... 563
Heard vs. Hall, 16 Pick. 457..... 563
Hitchcock vs. Sawyer, 39 Vt. 412... 201
Hibbard vs. McKindley, 28 Ill. 253, 267
Hollingsworth vs. Duane, 4 Dall. 353 28
Hovey vs. Magill, 2 Conn. 460, 680.. 287
Hoare vs. Graham, 3 Camp. 57.... 423
Hopkins vs. Com., 50 Penn. 10.... 446
Hortons vs. Townes, 6 Leigh, 47... 547
Houston vs. Laffer, 46 N. H. 507... 561
Holmes vs. Seeley, 19 Wend. 506.. 569
Hunt vs. Bennett, 4 Green, 512.... 89
Hugus vs. Strickler, 19 Iowa, 414.. 200
Hunt vs. Bullock, 23 Ill. 320..... 230
Humphrey et al. vs. Taggart, 38 Ill. 228..... 267
Huse vs. Greines, 2 N. H. 210..... 420
Hudgkins vs. Kemp, 18 How. 530.. 459
Ill. & Mich. Canal vs. The City of Chicago, 14 Ill. 334..... 54

Ingalls vs. Bulkley, 13 Ill. 315...90, 322
Ins. Co. vs. Brown, 11 Mich. 266... 228
Ingram vs. Plasket, 3 Blackf. 454.. 500
Ins. Co. vs. Moseley, 8 Wal. 412... 500

Jackson vs. Kemble, 18 Ill. 580.... 46
Jarard vs. Harper, 42 Ill. 457..... 89
Jackson vs. Lamphire, 3 Pet. 290.. 104
Jackson vs. Bowers, 18 Johns. 110, 214
James vs. Morey, 2 Cow. 297..... 219
Jackson vs. Willard, 4 Johns. 43... 220
Jackson vs. Van Dalfsen, 5 Johns. 44, 256
Jell vs. Douglass, 4 B. & Ald. 374.. 177
Jefts vs. York, 4 Cush. 371..... 283

PAGE.

Johnson et al. vs. Baker, 38 Ill. 98, 116
Jones vs. Littledale, 6 A. & E. 486, 280
Johnson vs. Barber, 4 Gilm..... 490

Kenney vs. Greer, 13 Ill. 432..... 277
Kemp vs. Moundel, 9 Leigh, 12 307
Kelley vs. Taylor, 23 Cal. 11..... 563
Kirk vs. Newell, 1 T. R. 125..... 321
King vs. Haines, 23 Ill. 341..... 497
Kirby vs. Holmes, 6 Ind. 33..... 488
Korth vs. Light, 15 Cal. 326....184, 189
Keyes vs. Wood, 21 Vt. 331..... 210

Latham vs. Smith, 45 Ill. 29..... 204
Lantry vs. Parks, 8 Cow. 63..... 277
Latschaw vs. Steinman, 11 S. & R. 356..... 458
Leonard et al. vs. Hughill, 2 Scam. 361..... 34
Leitensdorper vs. Webb, 20 How. 176..... 41, 94
Leveringe vs. Dayton, 4 Wash. C. C. 698..... 162
Leitensdorfer vs. Webb, 20 How. 181..... 181
Leonard vs. N. Y. Tel. Co., 41 N. Y. 565..... 243
Lester vs. Howard Bk., 38 Md. 558, 543
License tax cases, 5 Wall. 463..... 80
Limerick petitioners, 18 Mann..... 457
Luby vs. Hudson River R. R. Co., 17 N. Y. 131..... 76
Ludlow vs. Ramsey, 11 Wall. 582.. 430
Lusk vs. Hastings, 1 Hill, 656..... 456

Macfarland et al. vs. Lewis et al., 2 Scam. 344..... 32
Marbury vs. Madison, 1 Cranch, 127, 48
Martin vs. Ehrenfels, 24 Ill. 188 ... 51
Martin et al. vs. Eversal et al., 36 Ill. 214..... 64
Massey vs. Westcott et al., 40 Ill. 96, 116
Martin vs. Barnhardt, 39 Ill. 12 ... 163
Maher vs. Bull, 26 Ill. 348..... 174
Macolm vs. Rogers, 1 Cowen, 1 174
Maynard vs. Johnson, 2 Nev. 16, 25, 200
Martin vs. Mowlin, 2 Burr. 978.... 220
Masterton vs. Mayor of Brooklyn, 7 Hill, 61..... 245
Mackinley vs. McGregor, 3 Whart. 398 320
Mayor of N. Y. vs. Nichols, 4 Hill, 209..... 327

PAGE.

Mantz vs. Handley, 2 Hen. & Munf. 308 429
Mandeville vs. Riddle, 1 Cranch, 290..... 495
McCracken vs. Heyward, 2 How. 308 105
McLagan vs. Brown, 11 Ill. 519.... 116
McGee vs. The State, 8 Mo. 495.... 135
McKinney vs. The People, 2 Gilm. 551 140
McDonald vs. Arnout, 14 Ill. 58 ... 174
McGovern vs. Hoesback, 53 Penn. 178 201
McClure vs. Secrist, 5 Ind. 31 277
Mc Bain vs. Enloe, 13 Ill. 76..... 380
McKee vs. Com., 1 Bennett L. C. 297 453
Mershon vs. Withers, 1 Bibb. 508.. 193
Merry vs. Sylburn, 2 Johns. Ch. 441 213
Merrill vs. Forbes, 5 Wend. 238 ... 306
Merrill vs. Forbes, 5 Wend. 239 ... 308
Mease, ex'r. vs. Mease, 1 Cowp. 47, 423
Methard vs. The State, 19 Ohio, 367, 451
Millers vs. Mariners' church, 7 Greenl. 51..... 240
Middleton vs. Price, 2 Strange, 1184, 253
Middleton vs. Price, 11 Strange, 1184 305
Miller vs. Wells, 46 Ill. 49 423
Milk vs. Christie, 1 Hill, 102 502
Moore vs. Purple, 3 Gilm. 149 84
Mott vs. Clark, 9 Penn. St. 399.... 213
Moors vs. Parker et al., 3 Mass. 310, 305
Moody vs. The State, 7 Blackf. 424, 312
Moor vs. Titman 33 Ill. 364 336
Mosely vs. Robinson, 10 B. & C. 729, 423
Moore vs. The People, 3 Gilm. 158, 424
Morris vs. Trustees, etc., 15 Ill. 269, 435
Moffit vs. Pollard, 19 Ind. 178 471
Morse vs. Copeland, 2 Gray, 305... 558
Munford vs. Wardell, 6 Wall. 425.. 96
Myers et al. vs. Hunter et al., 20 Ohio, 381..... 92

Nash vs. Drew, 5 Cush. 422..... 255
Nash vs. Towne, 5 Wal. 703..... 280
Nausen vs. Walker, 1 Stark. 361... 423
National B'k vs. Norton, 1 Hill, 578, 546
Nichols, Adm'r, vs. Davis, 1 Bibb, 490 194
Nixon vs. Weyrich, 20 Ill. 600..... 380
Nilson vs. Iverson, 19 Ala. 95..... 501

PAGE.

Nilson vs. Iverson, 17 Ala. 216..... 501
Noble vs. Holmes, 3 Hill, 194..... 305
Nye vs. Liscomb, 21 Pick. 263..... 174

O. & M. R. R. Co. vs. McCutchin, 27 Ill. 9..... 380
Offutt vs. Ayres, 7 Mon. 356..... 284
Olds vs. Cummings, 31 Ill. 192..... 211
Osborn vs. Hart, 24 Wis. 89..... 570
Owens vs. Starr, 2 Lit. 230..... 432

Patterson vs. U. S., 2 Wheat. 221.. 228
Patty vs. Winchester, 20 Ill. 261... 389
Parker vs. Palmer, 22 Ill. 489..... 390
Padgett vs. Lawrence, 10 Paige, 170, 435
Pasham vs. Decatur Co., 9 Ga. 352, 567
Parker vs. Webster, 2 Sid. 39..... 568
Pennington vs. Galland, 9 Ex. 9.. 554
Pheysey vs. Vicary, 16 M. & W. 484 554
Pitcher vs. King, 1 Carr. & Kir. 655, 159
Pick vs. Vankirk, 15 Ind. 159..... 471
Pitman vs. Poor, 38 Me. 237..... 559
Power et al. vs. McCord et al., 26 Ill. 214..... 64
Pomeroy's Lessee vs. State Bank, 1 Wall. 592.....182, 174
Polk vs. Slocum, 3 Blackf. 422.... 429
Pratt vs. Felton, 4 Cush. 175..... 111
Prior vs. Wood, 31 Penn. St..... 213

Queen vs. Hepburn, 7 Cranch, 297, 28

Ray vs. Wooters, 19 Ill. 82..... 61
Rany et al. vs. The Gov. 4 Blackf. 2, 173
R. R. Co. vs. Howard, 13 How. 344, 245
Rankin vs. Crowell, Miner, 125.... 264
Rayner vs. Julian, 2 Dick. 677..... 346
Rex vs. Shaw, 6 Carr. & Payne, 490, 137
Rey vs. Simpson, 22 How. 341..... 167
Reeves vs. Scully, Walk. Ch. 248.. 222
Relyea vs. Drew, 1 Denio, 563..... 239
Rex vs. Pemberton, 2 Burr. 1036.. 297
Reigard vs. McNeil, 38 Ill. 401..... 336
Reynolds vs. Orvis, 7 Cow. 271.... 429
Rex vs. Phillips, 3 Camp. 73..... 516
Rives vs. Kumber, 27 Ill. 291..... 391
Riddle vs. Mandeville, 5 Cranch, 290 495
Ricker vs. Kelley, 1 Greenl. 117.... 558
Rose vs. Mortimer, 17 Ill. 475..... 205
Rosenburg vs. Angel, 6 Mich. 509.. 307
Rossiter vs. Rossiter, 8 Wend. 494, 400

PAGE.

Roberts vs. The People, 19 Mich. 1, 446
Roosevelt vs. Gardner, 2 Cow. 463, 502
Robinson vs. Hare, 11 Hare, 24..... 542
Ryner vs. Cook, 22 E. C. L. 479... 82
Ryer vs. Carter, 1 H. & N. 916..... 554

Sayre vs. Nichols, 7 Cal. 541..... 286
Salvidge vs. Hode, 5 Mad. Ch. 94... 345
Sampson vs. Burnside, 13 N. H. 264, 560
Shorter vs. The People, 2 N. Y. 193, 134
Shepard vs. Mil. Gas Co., 15 Wis. 327 238
Shepard vs. Butterfield, 41 Ill. 76.. 267
Shivers vs. Willson, 5 Harr. & J. 130 429
Shaw vs. Benkard, 10 Ind. 227..... 457
Shekdale vs. Johnson, 14 Iowa, 179, 458
Shaw vs. Bebee, 35 Vt. 208..... 563
Sharon vs. Minnick, 6 Nev. 389.... 563
Sloan vs. The State, 8 Blackf. 361.. 80
Slipper vs. Stidstone, 5 Term R. 493..... 177
Slicer vs. Bk of Pittsburgh, 16 How. 579 458
Smith vs. Lloyd, 1 Madd. 56..... 483
Smith vs. Doe, 7 Price, 509..... 563
Sneed vs. Wister, 8 Wheat. 694.... 487
Snyder vs. Warford, 11 Mo. 513... 554
Snowdon vs. Wilds, 19 Ind. 14..... 563
Spears vs. Clark, 3 Ind. 297..... 391
Squire et al. vs. N. Y. Tel. Co., 41 N. Y. 565..... 243
Squire vs. Hollenbeck, 9 Pick. 551, 308
Stimpson vs. Bal. & Sus. R. R. Co., 10 How. 345..... 96
Steamship Co. vs. Joliffe, 2 Wall. 450 105
Stocking vs. Hunt, 3 Denio, 274.... 106
State vs. Dowd, 19 Conn. 387..... 125
State vs. Mill, 3 Nev. 444..... 146
Staats vs. Ex'rs of Ten Eyck, 3 Caines, 116..... 239
Stoner vs. Ellis, 6 Ind. 102..... 259
Stewart vs. State, 5 Ohio, 145..... 296
State vs. Gilbert, 13 Vt. 647..... 312
Stevens vs. Bicknell, 27 Ill. 444..... 376
Staples vs. Fairchild, 3 Comst. 41.. 429
State vs. Gillick, 7 Iowa, 287..... 446
State vs. Dowd, 19 Conn. 387..... 446
State vs. McClure, 5 Nev. 132..... 453
State vs. Bartlett, 43 N. H. 224..... 453
State vs. Flye, 26 Me. 316..... 453
Sutherland et al. vs. Ryerson et al., 24 Ill. 517..... 375

PAGE.

Swift et al. vs. Green et al., 20 Ill. 173 73
Swett vs. Brown, 5 Pick. 178..... 255
Swingley vs. Haynes, 22 Ill. 216... 330

Taylor vs. Porter, 4 Hill, 140..... 570
Thompson vs. Riggs, 5 Wall. 663, 132, 71
The People vs. Ridgley, 21 Ill. 65.. 85
The People vs. Marsh, 6 Cal. 542... 135
The People vs. King, 27 Cal. 507... 144
The People vs. Byrnes, 30 Cal. 207, 145
The People vs. Godfrey, 17 Johns. 226 131
The Am. Ins. vs. Oakley et al., 9 Paige, 496..... 186
Thornton vs. Pegg, 24 Mo. 247..... 215
Thompson vs. Shattrick, 2 Meto. 618, 240
The Schooner "Lively," 1 Gal. 315, 241
Thompson vs. Jackson et al., 14 B. Mon. 114..... 245
The People vs. Collins, 7 Johns. 549, 253
The People vs. Jackson, 3 Hill, 92, 296
The People vs. May, 3 Mich. 598... 359
Thorpe vs. Burling, 11 Johns. 285, 427
The People vs. Potter, 5 Mich. 1... 446
The People vs. Sanchez, 24 Cal. 17, 446
The People v. Carmichael, 5 Mich. 21 523
Tindall vs. Cobham, 6 M. & K. 385, 483
Tompkins vs. Hale, 3 Wend. 406... 27
Tomlinson vs. Blacksmith, 7 T. R. 132..... 408
Turner et al. vs. Young, 22 Ill. 255, 116
Tucker vs. Fairbanks et al., 98 Mass. 104 281

U. S. vs. Cornell, 2 Mason, 62..... 36
U. S. vs. Bevans, 3 Wheat. 390, 388, 38, 180
U. S. vs. Turner et al., 11 How. 663, 108
U. S. vs. Pacheco, 20 How. 263, 184, 189
U. S. vs. Gomez, 23 How. 327..... 190
U. S. vs. Thompson, 6 McLean, 57, 311
U. S. vs. Lancaster, 2 McLean, 433, 312
U. S. vs. Patterson, 6 McLean, 466, 313

Van Landingham vs. Fellows et al., 1 Scam. 283 34
Vandenheuvel vs. Storrs, 3 Conn. 203 177
Vawter vs. The State, 7 Blackf. 592, 516
Violet vs. Waters, 1 J. J. Marsh. 303 488

	PAGE.
Vowles vs. Miller, 3 Taunt. 139	262
Vosburg vs. Welch, 11 Johns. 444..	429
Voorhies vs. Bank U. S., 10 Pet. 449	430
Warren vs. Iscarian Community, 16 Ill. 114	115
Watson vs. Huson, 1 Duer, 252....	188
Walker vs. Dement, 42 Ill. 273.....	212
Ward vs. Smith, 11 Price, 19.....	238
Wade vs. Leroy et al., 20 How. 24,	245
Waters vs. Powers, 21 Eng. Law & Eq. 410.....	245
Walsen vs. Nettleton, 13 Ill. 62....	330
Waldo vs. Richter, 17 Ind. 634.....	487
Watson vs. Thrall, 3 Gilm. 69.....	490
Westfall vs. Jones, 23 Barb. 10	213
Webb vs. Burke, 5 B. Monr.....	284
West vs. Randall et al. 2 Mason 200,	346
Webster vs. Vickers, 2 Scam. 295,	399
Wells vs. Baldwin, 18 Johns. 46..	423
Webster vs. Com., Cush. 304.....	444
West River Bridge Co. vs. Dix, 6 How. 532.....	555
Wents vs. De Haven, 1 Serg. & R. 312	563
Whittaker vs. Freeman, 1 Dev. 271,	321
Whiting vs. Willson, 5 Harr. & J. 180	429
Whitford vs. Com., 6 Randolph, 722	446
White vs. Perkins, 24 Pick. 457...	563
Wight vs. Warner, 1 Doug. 384....	429
Willson vs. Arnold, 5 Mich. 98....	429
Wilson vs. Chalfant, 15 Ohio.....	561
Wickersham vs. Orr, 9 Iowa, 260..	561
Woodside vs. Woodside, 21 Ill. 207	10
Woodward vs. Turnbull, 3 Scam. 1,	80
Worsley vs. Wood, 6 Term R. 718,	159
Woodbridge vs. Spooner, 3 B. & A. 233	423
Woodbury vs. Parshley, 7 N. H. 237	559
Wood vs. Leadbitter, 13 M. & W.	562
Young vs. Grundy, 6 Cranch, 51...	10
York vs. Com., 9 Meto. 93.....	452

RULES OF THE SUPREME COURT.

Adopted September 28, 1872.

WRIT OF ERROR; SUPERSEDEAS; PROCESS ON WRITS OF ERROR.

I. Writs of error shall be directed to the clerk or keeper of the record of the court, in which the judgment or decree complained of is entered, commanding him to certify a correct transcript of the record to this court. But when the plaintiff in error shall file, in the office of the clerk of this court, a transcript of the record, duly certified to be full and complete, before a writ of error issues, it shall not be necessary for the clerk of the inferior court to certify another transcript of the record to this court, but such transcript so filed with the clerk of this court shall be taken and considered to be a due return to said writ, and in such case the clerk of the inferior court shall return upon said writ, that the same has been served upon him, and that it appears by the indorsement thereon that a transcript of the record has been filed in the office of the clerk of the supreme court.

II. A *scire facias* or summons to hear errors may be made returnable on any day of the term; but all such writs which shall be issued more than ten days before the term shall be made returnable on the first day of the term, and if any such writ shall not be served ten days before the return day thereof, the defendant so served shall not be required to appear in obedience thereto until the first day of the term of court next succeeding such return day. A defendant, upon whom process has not been served, may enter his appearance and, upon five days' notice to the plain-

tiff, may proceed in the same manner as if duly served with process.

III. If a *scire facias* or summons to hear errors shall not be served, an *alias* or *pluries* may be issued without an order of court therefor.

IV. No supersedeas will be granted unless the transcript of the record, on which the application is made, be complete and certified by the clerk of the court below, with an assignment of errors written thereon or appended thereto.

V. When a writ of error shall be made a supersedeas, the clerk shall indorse upon said writ the following words: "A transcript of the record in this cause having been filed in my office with an order indorsed thereon, that the writ of error herein be made a supersedeas according to law, this writ of error is therefore made a supersedeas and shall operate accordingly;" which indorsement shall be signed by the clerk of this court.

VI. Whenever execution or other final process shall be issued upon a judgment at law or decree in equity, and the record of such judgment or decree shall be removed into this court by writ of error operating as a supersedeas, such writ of error may be served upon the officer in whose hands such execution may be, and thereupon all proceedings under such execution shall be discontinued, and such officer shall return the same into the court from whence it was issued, together with the copy of the writ of error served on him, and shall set forth in his return to such execution what, if any thing, he hath done in obedience to the command thereof. Such service of the writ of error and supersedeas may be made by delivering to the officer having such final process for execution a copy of such writ of error and the indorsements thereon, with the certificate of the clerk of the supreme court or of the clerk of the inferior court, to whom the same is directed, that the same is a true and perfect copy of the original of such writ of error and the indorsements thereon.

VII. Whenever a bond is executed by an attorney in fact, the original power of attorney shall be filed with the bond in the office of the clerk of this court, unless it shall appear that the power of attorney contains other powers than the mere power to execute the bond in question, in which case the original power

of attorney shall be presented to the clerk and a true copy thereof filed, certified by the clerk to be a true copy of the original.

TRANSCRIPT OF THE RECORD.

VIII. Clerks of inferior courts, in making up an authenticated copy of the record, shall certify to this court a copy of the process with the return thereto, the pleadings of the parties, the verdict in jury trials, the judgment of the court below and all orders of the court, the bill of exceptions, the appeal bond in cases appealed. This rule shall not extend to appeals or writs of error in chancery or criminal causes.

IX. The clerk of the court below shall arrange the several parts of the record in chronological order.

X. The clerk of this court shall not tax as costs in this court any matter inserted in the transcript contrary to the foregoing rules.

XI. The appellant or plaintiff in error, or his attorney, may, by precipe, indicate to the clerk what of the files of the cause shall be inserted in the record, and in such case, if the record shall be insufficient, it shall be perfected at his costs, and if unnecessarily voluminous, the costs of the unnecessary parts shall be taxed against him.

ASSIGNMENT OF ERRORS.

XII. Appellants and plaintiffs in error shall assign errors at the time of filing the transcript of the record, and each error shall be separately alleged and particularly specified. When the error alleged is to the charge of the court, the part of the charge referred to shall be quoted *totidum verbis* in the specifications. The same shall be signed by an attorney or counselor of the court.

XIII. If the appellant or plaintiff in error shall fail to assign errors, the appeal or writ of error may be dismissed, and if the appellee or defendant in error shall not appear and join in error the cause may be heard *ex parte*, or the judgment or decree may be, in the discretion of the court, reversed without a hearing.

XIV. Counsel will be confined to a discussion of the errors stated, but the court may, in its discretion, notice any other errors appearing in the record.

ABSTRACTS OF THE RECORD.

XV. Appellants and plaintiffs in error, in all causes in the supreme court, shall prepare a printed abstract of the record in each case, in which they shall set forth the title of the cause, with the date of the filing of all papers in the court below, and a brief statement of the contents of each pleading, and shall set forth fully the points of the pleadings or evidence, and the points relied upon for the reversal of the judgment or decree. The clerk of the court below shall also number each folio of one hundred words, in the transcript of the record, and appellants and plaintiffs in error shall refer to the same in the margin of the abstract in such manner that orders, pleadings and evidence referred to in the abstract may be easily found in the record. They shall file with the clerk of this court, for the use of the appellee or defendants in error and judges of this court, four copies of such abstracts at least three days before the cause is heard.

XVI. The defendant's counsel shall be permitted, if he is not satisfied with the abstract or abridgment by the plaintiff's counsel, to furnish each of the justices of this court with such further abstracts as he shall deem necessary to a full understanding of the merits of the cause.

XVII. In case the appellant or plaintiff in error shall neglect to file an abstract, in compliance with the rules of this court, the opposite party may file the abstract and prepare the cause for a hearing *ex parte*, and have the costs taxed therefor, provided the appellant or plaintiff in error would have been entitled to have the cause heard at the same term, or the court may dismiss the appeal or writ of error.

XVIII. If the abstracts filed shall not present the parts of the record to which reference is made in the assignments of errors, the appeal or writ of error may be dismissed.

BRIEFS AND ARGUMENTS OF COUNSEL.

XIX. The brief of the counsel for appellant or plaintiff in error shall contain a statement of the errors relied upon and the authorities to be used in the argument, and four copies thereof shall be filed with the clerk of this court at least three days be-

fore the cause is heard. One of the copies may be withdrawn by the counsel for appellee or defendant in error, and the others shall be for the use of the justices of the court.

XX. Counsel for appellee or defendant in error shall also file with the clerk four copies of his brief for the use of the justices, and the opposing party, on or before the day next preceding the day in which the cause is to be heard.

XXI. In citing cases from published reports, the names of the parties as they appear in the title of the case, as well as the book and page, shall be given.

XXII. Counsel who have not complied with the rules relating to briefs will not be heard.

XXIII. If the counsel for both parties shall submit arguments in writing, it shall not be necessary to file briefs; but if counsel for either party shall desire to address the court orally, the opposing counsel shall file his brief as required by the rule.

MOTIONS.

XXIV. All motions, except motions for further time to assign errors or to file briefs, abstracts and the like, shall be in writing, and at least twenty-four hours' notice of the time at which the same will be heard shall be given to the opposite party.

XXV. The party holding the affirmative shall begin and conclude the argument upon the hearing of any matter before the court.

DISMISSAL OF APPEALS.

XXVI. If a transcript of the record shall not be filed as required by law in case of appeal, the appellee may present a transcript of the judgment, the order allowing the appeal, the bond and the approval thereof, and thereupon the appeal shall be dismissed with costs.

WITHDRAWAL OF PAPERS.

XXVII. No paper shall be taken from the files except by leave of court; but appellants and plaintiffs in error may withdraw the transcript of the record, for the purpose of making abstracts, upon giving receipt therefor to the clerk; and, upon such withdrawal, may retain the same for eight days and no more.

If the appellee or defendant in error shall desire to make an abstract of the record, he may withdraw the transcript upon giving the like receipt and retain the same for the like time.

Neither party shall withdraw the transcript of the record more than once.

AGREED CASE.

XXVIII. No judgment will be pronounced in any agreed case unless an affidavit of some credible person shall be filed, setting forth that the matters presented by the record were litigated in good faith, about a matter in actual controversy between the parties, and that the opinion of this court is not sought with any other design than to adjudicate and settle the law relative to the matter in controversy between the parties to the record.

REHEARING OF CAUSES.

XXIX. Application for rehearing of any cause shall be by petition to the court, signed by counsel, briefly stating the points wherein it is alleged that the court has erred; such petition to be filed within fifteen days next after the filing of the opinion in the cause, if the same shall have been filed in term time, or if such opinion shall have been filed in vacation, then within the first five days of the next succeeding term: counsel may accompany such petition with a brief of the authorities relied upon in support thereof.

XXX. If in any cause in which the opinion of this court is filed in vacation, or within fifteen days of the adjournment of the court, a petition for rehearing is presented to either of the justices of this court, and he shall certify that there is probable cause for granting the prayer of the petition, all further proceedings authorized by the judgment of this court shall be stayed until the next term of the court.

COSTS.

XXXI. Upon printed abstracts being furnished, as required in the foregoing rules, it shall be the duty of the clerk to tax a printer's fee at the rate of forty-five cents for each one hundred words of one copy of such abstract, against the unsuccessful party not furnishing such abstracts, as costs, to be recovered by the successful party furnishing the same.

XXXII. Clerks of district and probate courts shall be entitled to receive the fees allowed by law for all copies of records before delivering the same. If, in a criminal cause, the defendant shall be unable to pay for a transcript of the record, the justice assigned to the judicial district in which such record may be shall have power to order and direct that such transcript be made and furnished to the defendant without charge.

ATTORNEYS.

XXXIII. No person shall be admitted to practice as an attorney and counselor at law, upon evidence that he hath been admitted to the bar of another State or territory, unless such evidence shall proceed from the highest court of law or equity authorized by the laws of such State or territory to grant the same, nor unless such admission to the bar of such other State or territory shall have been upon examination of the applicant or other evidence of his knowledge of law. Provided, that if it shall appear by the affidavit of some disinterested party or other satisfactory evidence, that the applicant has been actually engaged in the practice of law as his usual occupation in the State and territory wherein such license was obtained, for the space of two years, such applicant may be admitted to the bar of this court.

XXXIV. No person shall be admitted to practice as an attorney and counselor at law upon evidence that he hath been admitted to the bar of another State or territory, if, at the time of his admission to the bar of such State or territory, he was a citizen of this territory.

XXXV. No person shall be admitted to practice law in this territory, who shall not first have taken and subscribed an oath, that it is *bona fide* his intention to become a citizen of the territory of Colorado, and to make the practice of the law his permanent and usual occupation, and that he will commence the practice of the law therein within three months from the date thereof, and the fee of the clerk of the supreme court for filing such oath and entering the name of such party upon the record and issuing a license shall be $10.

XXXVI. There shall be hereafter kept in the office of the clerk of the district court of each county a roll of attorneys of the

supreme court, and, in order thereto, the clerk of the supreme court shall, within thirty days next after the promulgation hereof, transmit to the clerk of the district court in each judicial district a certified copy of this and the following rules: No. XXXVII, XXXVIII, XXXIX of this court, and of the roll of the attorneys of this court, as the same then appears in his office.

XXXVII. Upon receiving such certified copy of said rules and roll of attorneys, the clerk of each of the district courts shall cause the same to be entered at large in a book to be kept in his office, and shall immediately prepare copies thereof at length and certify the same to each of his deputies, except in the county where the said clerk himself resides, and each of such deputies shall in like manner enter such rules and the roll of attorneys in a book to be kept in his office; all such certificates shall be preserved in the office where the same are transmitted.

XXXVIII. Whenever the name of any attorney, hereafter admitted to the bar, shall be entered upon the roll of attorneys kept in the office of the clerk of the supreme court, the clerk of the supreme court shall certify to the clerk of the district court in each judicial district a copy of the roll of attorneys, so far as the same includes the name of such attorney so admitted, and the clerk of each of said district courts shall cause the name of such attorney so admitted to be entered upon the roll of attorneys so kept in his office, and shall prepare copies of such certificate of the clerk of the supreme court, and certify the same to each of his deputies, save in the county wherein the said clerk himself resides. When the name of such attorney shall in like manner be added to the roll of attorneys there kept, and no person shall be entered upon any such rolls of attorneys unless his name shall appear on the roll of attorneys of the supreme court certified in manner aforesaid.

XXXIX. Hereafter no clerk of any district court shall issue any writ, or permit any cause to be instituted or discontinued at the instance of any person, unless the name of such person appear upon the roll of attorneys in his office, or at the instance of the plaintiff in such cause appearing thereunto in his own proper person, and no person, whose name is not upon the roll of attorneys in the office of the clerk of such court, shall be permitted

to appear in any cause in any district court, or take part in any such cause, unless he is himself a party thereto, and then only in his own behalf.

LIBRARY.

XL. No book shall be withdrawn from the library of this court for any purpose, except by the order of the court in open session.

XLI. The foregoing shall be the standing rules of this court, and all other rules are hereby rescinded.

COLORADO REPORTS.

GARDNER *v.* DUNN.

APPEAL BOND, *may be amended.* On appeal to the district court from the judgment of a justice of the peace, if the appeal bond be adjudged insufficient, the appellant may file an amended bond, and time should be allowed him for that purpose.

Appeal from District Court, Park County.

Mr. S. E. BROWNE, for appellant.

Mr. C. C. POST, for appellee.

BRADFORD, J. This was an action of forcible entry and detainer, instituted before a justice of the peace of Park county on the 16th day of April, A. D. 1862. On the 5th of May, following, trial of said cause was had before the justice, and the verdict and judgment was for the defendant. The plaintiff appealed to the district court, and on the following day, May 6th, filed his appeal bond, which bond was approved by the justice. On the 3d of June, 1862, being one of the days of the June term of the district court of Park county, the cause came on to be heard, and the defendant moved the court to dismiss the appeal for want of a sufficient bond. The plaintiff asked leave to file a sufficient bond, the court refused the leave and sustained defendant's motion to dismiss appeal, and rendered judgment against plaintiff for costs. The plaintiff appealed to this court, and assigns the following errors, viz.:

1st. That the said court erred in sustaining the motion of the defendant to dismiss the said appeal.

2d. That the court erred in refusing to permit the plaintiff to file a good and sufficient bond.

3d. That said judgment was given for the defendant when it should have been given for the plaintiff.

It is not doubted by this court but that the appeal bond was informal and insufficient; but it is equally clear that the court erred in overruling the motion of the appellant to permit him to file a good and sufficient bond in pursuance of the forty-fifth section of the act of our legislature, entitled, "An act concerning justices of the peace and constables," approved October 31, 1861. That act, after prescribing the mode of taking appeals from judgments of justices of the peace, goes on and declares that "if upon the trial of any appeal the bond required to be given shall be adjudged informal or otherwise insufficient, the party who shall have executed such bond shall in nowise be prejudiced by reason of such informality or insufficiency; provided he will, in reasonable time, to be fixed by the court, execute a good and sufficient bond." That Gardner intended to take an appeal is manifest, and whenever a party intends appealing and makes such an attempt at the execution of a bond, that the officer authorized to approve accepts the bond, it is not the design of the statute that the appellant should be prejudiced by any informality or deficiency therein. By executing what was honestly intended to be a good bond, with such security as was approved by the justice, the appellant did all that was required of him until the bond was adjudged insufficient by the court; and even then, the law declares that such insufficiency shall not operate to his prejudice, if he will execute a good one. This the appellant offered to do, but the court refused permission and dismissed the appeal.

The evident intent of the legislature in enacting the law herein referred to was to simplify proceedings before justices of the peace, and to dispense with all technicalities consistent with a fair trial of the cause upon the merits. This just intent would be defeated by giving to the act any other construction than the one we have adopted.

The judgment of the district court is reversed and the cause remanded, with directions to that court to permit the appellant to file a good and sufficient bond, and to hear and determine the cause upon its merits.

Reversed.

LYNN v. MERRICLE.

Appeal from District Court, Jefferson County.

ASSUMPSIT before a justice of the peace, and appeal to district court. Motion by appellee to dismiss, because of defective appeal bond, and cross-motion by appellant for leave to file a sufficient bond. The district court refused to allow the amendment and dismissed the appeal.

BRADFORD, J. The opinion given at the present term of this court, in *Gardner* v. *Dunn*, *ante*, 1, is applicable to this case. The judgment of the district court must be reversed, and the cause remanded to the district court for further proceedings.

Reversed.

WILCOX et al. v. FIELD et al.

1 3
4 247

PRACTICE—*judgment nil dicit*. If defendants, after appearance, fail to plead or demur, judgment *nil dicit* should be rendered against them before other proceedings are had in the case.

JUDGMENT *exceeding ad damnum*. Judgment should not be rendered for a greater amount than is claimed in the declaration.

Error to District Court, Arapahoe County.

Mr. J. BRIGHT SMITH, for plaintiffs in error.

Mr. G. W. PURKINS, for defendants in error.

BRADFORD, J. This was an action in debt, instituted in the district court of Arapahoe county, on the 2d day of

July, A.D. 1862, by C. H. Field and E. Magoffin, trustees of Jones & Cartright, against B. C. Wright, P. P. Wilcox, E. C. Mason and D. M. Bivens, on a promissory note alleged to have been executed by said defendants, and payable to said plaintiffs on the 21st day of December, 1861, for the sum of $110, the *ad damnum* in the plaintiff's declaration being laid at $110. At the August term of said district court, the cause came on to be heard, and the defendants, by J. Bright Smith, their attorney, appeared and filed a motion to dismiss the suit, alleging that plaintiffs were non-residents of Colorado territory; and said motion being heard, the court overruled the same, and ordered the case referred to the clerk to assess damages. The clerk, the same day, reported the plaintiffs' damages at $127.84, and the court thereupon rendered judgment against the said defendants for the sum of $127.84, and for costs.

To reverse this judgment the plaintiffs in error, being the defendants below, have brought the case to this court by writ of error.

The plaintiffs in error assign the following errors, viz.:

1. There was no judgment of *nil dicit* rendered against the plaintiffs in error in default of a plea, but a reference made to the clerk to assess damages without such judgment.

2. The final judgment rendered is for a greater amount than the *ad damnum* in the declaration.

It is a well-settled rule of practice that where defendants, after appearance, neither plead nor demur, judgment of *nil dicit* will be rendered against them before any other proceedings are had in the case. The record in this case discloses the fact, that the court referred the matter to the clerk for the assessment of damages without first rendering an interlocutory judgment against the defendants for want of a plea, as the law requires. In this we think there is manifest error (see Colorado statute, first session, § 15, p. 279, Stephen's Pleadings, 108).

It is equally apparent that the court erred in rendering judgment for a greater amount than the sum claimed in the

declaration. This is a matter of substance, it being apparent from the record that the court could not legally render such a judgment; from the evidence presented in the record, the proper judgment, so far as the amount is concerned, was entered by the district court; but this was unwarranted by the declaration and consequently illegal. See Stephen's Pleadings, 429; 4 Gilman, 79. The judgment of the district court is reversed, and the cause remanded for further proceedings.

Reversed.

LEE v. RALSTON.

PRACTICE — *trial of appeals from justice of the peace.* Upon appeal to the district court from the judgment of a justice of the peace, the trial should be *de novo*, and the district court has no power to review the proceedings of the justice of the peace.*

Error to District Court of Gilpin County.

Mr. C. C. POST, for plaintiff in error.

Mr. H. B. MORSE, for defendant in error.

BRADFORD, J. This was an action of assumpsit commenced by Silas Ralston, the plaintiff below, on the 28th day of December, 1861, before H. D. Bristol, a justice of the peace of Gilpin county, against Wm. L. Lee and others, composing the Black Hawk Mill Co., and, on the 3d day of January, A. D. 1862, judgment was rendered against the said William L. Lee, the defendant, served with process, for the sum of $48.75, and costs, from which judgment of the justice of the peace the defendant Lee appealed to the district court of Gilpin county; and afterward, at the April term, A. D. 1862, of said court, the cause came on to be heard, and the record shows the following proceedings to have been had in said court, to wit:

---

* *Lee* v. *Dailey* and *Lee* v. *Fargo*, decided at this term, were to the same point.

"SILAS RALSTON
v.
WILLIAM L. LEE. } Appeal from justice of the peace.

And now this case came on to be heard, and the plaintiff appeared by his attorney, and the defendant, although solemnly called, came not; and no other proceedings being had, on motion of the plaintiff, it is considered that the judgment of the justice's court, for $48.75, be affirmed, and that the plaintiff recover of and from the defendant the said sum, and his costs and charges in this behalf expended, as well in the justice's court below as in this, and that he have execution therefor."

Which said judgment has been removed to this court by writ of error.

The plaintiff in error assigns the following errors, viz.: 1st. That the district court, not being a court of review, could not affirm or review the judgment of the justice's court. 2d. That the trial of said cause should have been *de novo*, and the court could not render judgment unless evidence was adduced to warrant it. 3d. The court erred in rendering judgment against William Lee alone, when the suit was brought against a firm of which he was a member.

In order to dispose of this cause in this court, we only deem it necessary to consider the second error assigned. By the act of our legislature, concerning justices of the peace and constables, it is provided, that, upon all trials of appeal before the district court, the court shall hear and determine the cause in a summary way, according to the justice of the case (see § 46); and it is further provided by section 48 of said act, that the rights of the parties shall be the same as in original actions. A fair construction put upon these sections leads us to the conclusion that causes brought up by appeal from justices' courts shall be tried *de novo*, and the judgment below furnishes no evidence to sustain the correctness of the decision of the justice. It consequently follows, that, when the cause is tried in the district court, its decision not being controlled by the decision below, the judgment must be rendered in accord-

ance with evidence adduced on the trial in the district court. The record in this case plainly showing that no evidence was produced and no trial had in the district court, the judgment of the court below must be reversed and the cause remanded for further proceedings.

Reversed.

ARMOR v. LYON et al.

1 7
1 10
6 223

DECREE—*what is final.* An order overruling a demurrer to a bill in chancery is not a final decree in the cause.

APPEAL *will not lie from an interlocutory order.* An appeal cannot be prosecuted from an order overruling a demurrer to a bill in chancery.

Appeal from District Court, Gilpin County.

APPELLANT demurred to the bill filed in the district court by appellees, and his demurrer was overruled. He then appealed to this court. Appellees now moved to dismiss the appeal, upon the ground that no final decree had been entered in the cause.

HARDING, C. J. This appeal must be dismissed, for the reason assigned.

Dismissed.

GIBSON v. SMITH.

1 7
2 375
6 223
1b 7
1a 307
1b 7
8a 488

DEFAULT *cannot be taken while demurrer is pending.* It is error to enter a judgment by default against a defendant who has a demurrer on file which has not been disposed of.

Error to District Court, Arapahoe County.

Mr. J. BRIGHT SMITH, for plaintiff in error.

Mr. L. B. FRANCE, for defendant in error.

HARDING, C. J. At the March term, 1863, of the district court of Arapahoe county, David Smith recovered against

the plaintiff in error a judgment for the sum of $509, and costs of suit taxed at $19. A default was taken against said Gibson, and the damages assessed by a jury who returned their verdict for the damages above named, upon which the court rendered judgment. It appears from the record that before default was entered against Gibson, the defendant in the district court, that he had appeared and filed a general demurrer to the plaintiff's declaration, which was then on file, and upon which no decision of the court had been had.

On the 14th day of April, 1863, a writ of error issued from this court on behalf of Gibson, and this case is before us for our action.

The whole case turns upon the first error which is assigned in plaintiff's brief and is as follows:

That the said court erred in giving judgment by default against the said Gibson, he having appeared and pleaded to the declaration previous thereto by general demurrer, upon which no decision whatever appears to have been given. 4 Scam. 53, 54.

We think that it is clear, that the district court committed an error in entering judgment by default against the defendant in the court below, when he had appeared to the action and filed his demurrer to the plaintiff's declaration, and when such demurrer was undisposed of, and in impaneling a jury to assess the damages.

Per curiam. The judgment is reversed for further proceedings in the district court, with costs, etc.

Reversed.

ANDREWS *v.* LOVELAND et al.

JUDGMENT *upon demurrer not final.* A judgment sustaining a demurrer is not final.

WRIT OF ERROR *will not lie from interlocutory judgment.* An appeal or writ of error will not lie from an interlocutory judgment.

Error to District Court, Jefferson County.

Messrs. J. BRIGHT SMITH and JAS. MACDONALD, for plaintiff in error.

Mr. G. W. PURKINS, for defendant in error.

HARDING, C. J. This is an action of assumpsit commenced in the district court and tried at the March term, 1862.

The abstract shows the following state of facts. The plaintiff in error filed his declaration against the defendants in the court below, which contained four counts.

1st. That plaintiff had recovered a judgment against the defendants in the district court for Jefferson county, in said territory, under the late provisional government, for $311 and costs of suit and interest thereon accruing, amounting in all to the sum of $410.37, which still remained due and unpaid, for which defendants were liable, and which they had promised to pay.

Second count set forth a promissory note, made by the defendants to the plaintiff, for the sum of $324, which they had promised to pay, etc.

Third count claimed $47.50 interest on an account stated between the parties.

Fourth count set up a general promise and breach.

To this declaration defendant Loveland filed a demurrer, alleging that the matters and things in the petition were not sufficient in law to maintain the action, etc.

The court sustained the demurrer, to which ruling of the court plaintiff excepted and sued out a writ of error from this court. The record in this case is most deficient, and we cannot determine the precise action of the court below from any thing before us. The judgment of the court in sustaining a demurrer is not a final judgment. *Hays* v. *Caldwell et al.*, 5 Gilm. 33; *Fleece* v. *Russell*, 13 Ill. 32.

An appeal or writ of error does not lie from an interlocutory decree or judgment. Practice Act, Stat. Colorado, 1st

Sess. 285; *Woodside et al.* v. *Woodside et al.*, 21 Ill. 207; *Cunningham* v. *Loomis et al.*, 17 Ill. 555; *Young* v. *Grundy* 6, Cranch, 51.

There is nothing to lead us to the conclusion that final judgment was rendered in this case in the court below. For this reason this case must be dismissed. We have determined this question at the present term of the court, in the case of *Armor* v. *Lyon et al.* This case is dismissed at the cost of plaintiff in error without prejudice to his suit in the court below.

Dismissed.

TOWNSEND et al. *v.* WILD et al.

CONSTRUCTION OF STATUTE — *mechanics' lien act of* 1861. The act of 1861, relating to mechanics' liens (1 Sess. 258), is not retrospective.

MECHANICS' LIEN — *prior to November* 4, 1861. A party who furnished materials toward the erection of a building prior to November 4, 1861, cannot have a lien for the value thereof upon the premises benefited.

KANSAS TERRITORY — *law of, not in force here.* Nor can a lien upon the premises benefited be asserted under the mechanics' lien law of the late territory of Kansas for such materials.

Appeal from District Court, Arapahoe County.

Mr. MOSES HALLETT, for appellants.

Mr. G. W. PURKINS, for appellees.

BRADFORD, J. This was a petition for a mechanics' lien, filed in the district court of Arapahoe county on the 7th day of November, A.D. 1861, by J. E. Wild et al., plaintiffs, against the defendants, asking for judgment for the sum of $262.23, in payment for lumber and material alleged to have been furnished to said Foster, and used in buildings and inclosures upon lots Nos. 5 and 6, in block No. 12, in East Denver, in said county, and praying that said demand may be made a lien upon said lots, and that said lots be sold to satisfy the same; the petition further alleges that, at the

time of furnishing the material, the said Foster was the owner and occupant of said lots, and that, on the 2d day of September, A.D. 1861, the said Eliza Townsend, wife of the said Copeland Townsend, became the purchaser of said lots, and that said Foster then delivered possession of said premises to the appellants, who have retained possession hitherto. At the August term of the district court, A.D. 1862, this cause came on to be heard, and the court ordered a decree entered in accordance with the prayer of the plaintiffs' petition, rendering judgment against all the defendants for the sum of $262.23 damages, and for costs. From this judgment of the district court the defendants, Copeland Townsend and Eliza Townsend, appealed to this court. The appellants appear in this court upon assignment of ten errors; we will consider only the sixth assignment of error, not deeming it important or necessary to pass upon the other errors assigned. The sixth error assigned is as follows: "There was no law for the proceeding, the materials having been furnished, if any were furnished, before the passage of the law respecting mechanics' liens." The plaintiffs allege in their petition that they furnished the materials used in erecting buildings and inclosures on lots described in their petition to Foster (he then being the owner and occupant of said lots), within one year preceding the filing of said petition, which appears to have been on the 7th day of November, A.D. 1861; they further allege in said petition, that on the 2d day of September, A.D. 1861, Foster sold the premises to Mrs. Eliza Townsend, and then and there delivered possession of the same to the appellants, who retained possession at the time of the commencement of this suit, viz., on the 7th day of November, A.D. 1861.

The organic act of Colorado territory was approved on the 28th day of February, A. D. 1861. On the 4th day of November, A. D. 1861, the act of the legislature of Colorado, entitled "An act creating a lien in favor of mechanics in certain cases," was approved, which was the first law passed by the legislature of Colorado on the subject of

liens to mechanics and to persons furnishing materials used in the erection of buildings. On examination of said act it clearly shows that it was not even intended to be made retrospective, consequently it is clear that the plaintiffs cannot recover, by virtue of the provisions of said act, the premises sought to be affected by the plaintiffs having been conveyed to the appellants on the 2d day of September, 1861, long before the passage of said act, and it does not even appear that the appellant had any notice, either actual or constructive, of plaintiffs' claim upon the premises.

The attorney for the plaintiffs argues that the lien laws passed by the legislature of the territory of Kansas was in force in Colorado, until the passage of a law upon the same subject by the legislature of Colorado. A portion of Colorado territory embracing territory formerly within the limits of Kansas territory. We are unable to see the force of this reasoning. There is no provision in our organic law adopting or putting in force in this territory any portion of the laws of the late territory of Kansas, or any other laws excepting the constitution and laws of the United States.

This court being clearly of the opinion that, at the time of the purchase by the appellants of the premises upon which the plaintiffs claim a lien, there was no lien law in force in this territory, the judgment of the district court must be reversed, and the cause remanded for further proceedings.

Reversed.

---

1 12
4 247

McNASSER v. SHERRY.

PRACTICE—*upon overruling a demurrer.* Upon overruling a demurrer to a declaration if the defendant does not plead, further judgment of *nihil dicit* should be entered and a jury should be impaneled to assess damages. In such case it is error to swear the jury to try the issue joined.

Appeal from District Court, Arapahoe County.

Mr. AMOS STECK, for appellant.

Mr. G. W. PERKINS, for appellee.

. HARDING, C. J. This is an appeal from the judgment of the district court of Arapahoe county.

There is but a single question for us to decide. At the August term, 1862, of said court, the appellee recovered judgment in said district court for the sum of $296.75 in damages and costs, and this appeal is prosecuted to this court to reverse said judgment.

It appears from the record that a demurrer had been filed by defendant in the court below, which was overruled, to which ruling an exception was taken. That afterward a jury was impaneled and sworn, well and truly to try the issue joined, etc. These facts are made apparent to us from the bill of exceptions which is contained in the record. After the finding of the verdict by the jury a motion was made to set aside the verdict on the ground that the jury had been improperly sworn. It is clear that this fact was brought to the mind of the court, and yet, disregarding the motion, judgment was rendered on the verdict.

That is the error which is presented to us for our determination. There might have been another objection urged, but we will content ourselves by passing on the one before us.

When the jury was sworn to well and truly try the issue joined, etc., there was no issue joined in the case then on hearing. Upon the overruling of the demurrer, and the defendant failing to file a plea to the action, the proper practice would have been to have entered a judgment of *nihil dicit*, and then have impaneled a jury to assess damages, and not to well and truly try the issue joined, when no issue had been joined in the pleadings.

Per curiam. The judgment of the district court is reversed, with costs. Case remanded for further proceedings.

Reversed.

1 14
17 367

WIER v. BRADFORD.

PRACTICE — *demurrer should be heard.* A demurrer to a complaint for forcible entry and detainer should be heard and determined.

PRACTICE — *motion to dismiss should be heard.* So, also, a motion to dismiss, filed by leave of the court, should be heard and determined.

POSSESSION OF LAND — *in action for forcible entry.* In an action for forcible entry on lands, the plaintiff must show that he was in actual possession of the lands at the time of the alleged entry. Constructive possession is not sufficient to support the action.

Appeal from District Court, Gilpin County.

Messrs. BOWEN & MACDONALD, for appellant.

Mr. AMOS STECK, for appellee.

HARDING, C. J. This is an action for forcible entry and detainer, commenced by Bradford against Wier on the 20th day of April, 1862, before a justice of the peace of Arapahoe county. A judgment was rendered against the defendant, who appealed to the district court of said county. The case was taken to Gilpin county on change of venue, and tried at the March term thereof, 1863, by jury. Verdict in favor of plaintiff and judgment rendered on the same. An appeal was taken by defendant to this court, and the case is before us on the record, which is presented to us.

The complaint filed before the justice, and on which the case was tried in the district court without amendment, is as follows in substance: That the plaintiff was lawfully possessed of certain premises (describing them) in the county of Arapahoe, on the 20th day of February, 1862; that the defendant forcibly entered and detained the possession thereof to the damage of plaintiff $100. There is another allegation in the complaint, as follows: That the legal right to the possession of said premises is in the plaintiff, and that the defendant holds over after demand made in writing, and that the plaintiff claims damages in the sum of $100.

Before considering the error assigned, upon which we are

asked to reverse the judgment of the court, it becomes necessary to notice the statute under which this action is authorized:

SECTION 1. "No person or persons shall hereafter make any entry into lands, tenements or other possessions, but in cases where entry is given by law, and in such cases not with strong hand nor with multitude of people, but only in a peaceable manner, and if any person from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by fine."

The eleventh section of said act authorizes the complainant to recover against the defendant treble damages in an action of trespass, after conviction of the forcible entry and detainer aforesaid.

The twenty-second section provides that all matters in excuse, justification or evidence of the allegations in the complaint, shall be pleaded specially, or notice thereof given with the plea of general issue. Stat. 1 Sess., p. 251.

We will not notice here in this connection the proceeding on the trial before the justice of the peace. We do not sit here to take cognizance of matters arising in their courts, but from the record before us it seems that this cause was tried on the same papers in the district court as in the justice court, without amendment.

The defendant filed his demurrer in the district court to the complaint, as follows: 1st, assigning a misjoinder of actions; 2d, that it is not averred that the plaintiff was in possession of the premises; 3d, that the force is not averred to have been done with a strong hand; 4th, that the plaintiff claims damages in the sum of $100; 5th, that in the second count, assigning unlawful detainer, no contract is averred, and other insufficiencies.

On motion of the plaintiff, this demurrer, as it is called, was stricken from the files of the cause, to which the defendant excepted. The defendant obtained leave of the court to file a motion to dismiss plaintiff's action, and the motion was filed. Plaintiff moved the court to strike this motion to dismiss from the files of the cause also, which

motion was sustained, to which the defendant excepted; the case went to the jury, who returned a verdict in favor of the plaintiff, and the court rendered judgment. Defendant filed a motion for a new trial, which was overruled, and to which ruling of the court the defendant excepted. The defendant appealed to this court, and has assigned in his brief and abstract ten errors, upon which he relies for the reversal of the judgment of the district court. We will not notice all of them, but only such as must determine our action in this case. These are included in Nos. 1, 2 and 6 in defendant's brief, and are as follows: 1. That the said court erred in sustaining the motion of plaintiff to strike the demurrer filed by the defendant from the files of the cause, without consideration or decision upon the merits of the said demurrer. 2. That the said court erred in sustaining the motion made by the plaintiff to strike from the files of this cause the motion made by defendant to dismiss the said suit, without consideration, etc.

We have no doubt but that the court below erred in striking from the files of this cause the paper called a demurrer and the motion to dismiss plaintiff's suit, under the circumstances which are manifest to us. There is no rule of practice which can tolerate such a proceeding on the part of a court. There may arise cases where such a practice is justifiable and proper, but this is not such a case. The questions which the paper called a demurrer raised had never been decided by the court or acted on in this case. No matter how informally these questions may have been presented to the court, it, nevertheless, was the duty of the court to sustain or overrule the demurrer. So with the motion to dismiss plaintiff's action. After leave had been granted by the court to defendant to file his motion, it was then too late to object that the motion came too late, and it was the duty of the court to pass upon the merits of the motion, and not to strike it from the files. If this practice could be tolerated, it might lead to great abuses, and might become very convenient for any incompetent judge to hide his ignorance of the principles upon which he was

called upon to act. No matter whether or no the demurrer was sustainable, that does not alter the case. We will therefore give no opinion on that subject.

The sixth error assigned is as follows: The court erred in refusing to instruct the jury upon the issues joined, at the request of the defendant, as follows: That, to sustain the complaint in this case, the jury must find that the plaintiff was in the actual, not constructive, possession of the premises in question, and that the defendant, by an unlawful and forcible entry, actually dispossessed the plaintiff. 14 U. S. Digest, 320, §§ 13, 14 and 15; 8 Eng. 448.

We think that the above instruction was in accordance with the authorities on that subject, and that it ought to have been given by the court. The act of the legislature above cited must receive a construction consistent with itself and with the jurisdiction of justices of the peace. If all cases of entering into the possession of lands and tenements, where the title is in dispute, could be brought within the meaning of the act; if so broad a construction is put upon it as seems to have been contended for, it would give justices a jurisdiction totally repugnant to the limitations placed upon them by the organic act and the laws of this territory, which limit their jurisdiction. If the justices may try all cases where the defendant is found in the peaceable possession of land, without regard to the mode by which he gained possession, then, indeed, a proceeding in his court would supersede the necessity of prosecuting an action of ejectment in the district court.

There might be given many more reasons why the judgment of the district court must be reversed, but the above are sufficient.

The judgment of the court below is reversed, with costs. Case is remanded for further proceedings.

Reversed.

DORSETT v. CREW.

1 18
7a 401

JURISDICTION — *service of process.* It is error to enter judgment against parties who have not been served with process.

INSTRUCTIONS *should be written.* Instructions to the jury should be written, and the court should not orally qualify or modify them.

VERDICT EXCESSIVE. Where the verdict of the jury was for $221.66, and was expressed to be for the amount of a note, without interest, and it appeared that the note was for $221 only: *Held*, that it was error to receive and enter judgment on the verdict.

Appeal from District Court, Arapahoe County.

Mr. J. Q. CHARLES, for appellant.

Mr. MOSES HALLETT, for appellee.

HARDING, C. J. This is an appeal from the judgment of the district court of Arapahoe county. On the 3d of June, 1862, the appellee filed his affidavit in attachment against James L. Dorsett, G. B. Reed and F. Dorsett, junior, in aid of an action of assumpsit against the persons last named, commenced the same day. The cause of action consisted of a certain note made by the above-named defendants to the said Crew, on the 11th day of August, 1860, and payable three months from date, for the sum of $221. On the 4th of August, 1862, a summons issued against G. B. Reed, James L. Dorsett and F. Dorsett, jun., returnable to August term, 1862, of the said district court. There was no return of sheriff on the summons. On the fifth of August a writ of attachment issued against the property of James L. Dorsett alone, returnable to August term of said court.

On the 6th of August, 1862, the writ of attachment was returned executed June 3, 1862, by attaching three brown horse mules and one brown mare mule, the property of James L. Dorsett. On the 25th July, 1862, the plaintiff filed his declaration herein, containing two counts: 1. Count on the promissory note; 2. Common count for goods, wares, etc., and for work and labor, money had and received

ad damnum $300. Plaintiff also filed copy of note sued on in declaration.

At the August term of said court, the defendant, James L. Dorsett, appeared and filed a motion to dismiss the suit for want of a sufficient affidavit. The motion was overruled and an exception taken. Said J. L. Dorsett then filed his plea in abatement, denying the allegations set forth in the affidavit. Issue joined on said plea by the plaintiff and cause tried by a jury.

The court gave *oral* instructions to the jury, and made *oral* explanations to the written instructions given to the jury.

The jury rendered the following verdict: "*J. H. Crew* v. *G. B. Reed, James L. Dorsett and F. Dorsett, Jr.* We, the jury in the above-entitled cause, find verdict for plaintiff. Amount, $221.66 of note, without interest. C. H. Martin, foreman." The court rendered judgment on the verdict of the jury against all the defendants for the sum of $221.66.

On the 6th day of September, 1862, during the same term of said court, and two days after the entering of the judgment, the said James L. Dorsett, who was the only one of the defendants who had appeared or who had been served with process, made a motion for a new trial, and set down in his said motion, among others, the following reasons. There are seven causes assigned why a new trial should be granted, but it is necessary to notice only the following: 1. The verdict is contrary to the law and the evidence; 4. Because the court gave oral instructions and also oral explanations of his own written instructions; 7. And for other good and sufficient reasons.

This motion was accompanied by the affidavit of the said James L. Dorsett, for the purpose of supporting the same. This affidavit set forth the fact that the court gave the *oral* instructions above mentioned to the jury, and that the court also gave oral explanations, etc., etc.

This motion was overruled and exceptions taken. An appeal was prayed for, and it was ordered that the same be

allowed by defendant filing his bill of exceptions together with his bond for $600, in twenty days. The bill of exceptions was duly preferred and signed in vacation. Also the bond was filed, and this case is now before us for our action.

As was remarked above, we decline considering all the reasons set down by the appellant in his motion for a new trial. We will advert to the error assigned on behalf of appellant, and on which he relies for the reversion of the judgment of the court below. But in doing this we will not consider in their order all the errors assigned, for the reason that we have not the authorities before us, which would enable us to treat each one of them in detail; neither does it become necessary to arrive at a just conclusion in determining our final action in the premises. We will, therefore, refer to the third, fifth and seventh errors assigned. They are as follows: 3d. The court erred in overruling the motion for new trial; 5th. The court erred in giving *oral* instructions and in explaining *orally* his written instructions; 7th. The court erred in receiving the verdict, and in rendering judgment for more than was claimed in the affidavit and declaration.

The evidence upon which the jury found their verdict is contained in the bill of exceptions, although, perhaps, the bill of exceptions is technically deficient in not stating that this was all the evidence offered in the trial of the case, and, if the court below had refused a new trial upon the ground that the evidence did not warrant the finding of the jury, we should not feel disposed to interfere, for the reason that it is the peculiar province of the jury to find the facts from the evidence, and where there is conflicting evidence on both sides of the case, the court will not disturb the verdict or grant a new trial, unless it is apparent that great injustice would be done the opposite party in refusing the same. It is manifest that there was evidence on both sides upon which the jury could make their finding. But the question arises, did the court below err in receiving the verdict of the jury in this case? We think that it did. The verdict is against all the defendants, or, at least, it would seem that

the court below so considered it, for judgment was rendered against all the defendants. Was this proper? It does not appear that service was ever had on any one of them but James L. Dorsett; neither does it appear from the record that either of the other defendants ever appeared, either by himself or any other person, and answered to the complaint. The judgment is personal, and not *in rem*. The property of James L. Dorsett had been levied on in attachment, but it does not appear that any service had ever been made on Reed and Dorsett, Jun., by which they could be considered as before the court. The authorities are clear on this subject. This was an action of assumpsit on the note for $221, and which was signed by all the defendants in the court below. The writ of attachment was in aid of the action of assumpsit, but, unless the defendants had been legally served with process, no personal judgment could be rendered against them, unless they entered their appearance upon the trial, which would have been a waiving of the process. It must be remembered that in a proceeding *in rem* the judgment of the court only subjects the property attached to the payment of the defendant's debts, unless, as before observed, personal service has been had on the defendant, or other steps have been taken which are equivalent to the same. Under these circumstances, we think that the court erred in overruling the motion for a new trial.

5. The next error which we shall notice is No. 5, in the series set down in the appellant's brief, and is as follows: The court erred in giving *oral* instructions and by explaining *orally* his written instructions. If we had found nothing else wrong in the record of this case, this would be a fatal error upon which the judgment of the court below must be reversed.

By the statute of this territory (1st Sess. 282, § 28), we find the following provision: "The district court in all cases, both civil and criminal, shall only instruct the petit jury as to the law of the case, and such instruction shall be reduced to writing, and may be taken by the jury in their retirement and returned by them with their verdict," etc.

The court in this committed a palpable error. It will not do for appellee to say that we are not advised as to what these oral instructions were; that they may have been in favor of the defendant, etc. Nothing would reconcile this practice of the court but the express consent of the parties that the court might so instruct. We do not know what effect these *oral* instructions may have had on the mind of the jury, neither did it become necessary for the defendant to embody in his bill of exceptions these instructions. If the court proceeded to so instruct, in violation of an express statute, it was in the power of either party to take advantage of the error so committed by the court. We will not give a direct opinion as to what may be construed by this court as the *consent* of the parties, assuming that such a case was now before us involving that question. If the court should proceed to instruct the jury *orally* over the objection and protest of one of the parties, the other party sitting by and making no objection, then, in such a case, the particular circumstances might modify our ruling. But there is nothing of the kind here; the facts stand out clearly in the bill of exceptions, that the court in this instance did what it had no right to do on the hearing and trial of a suit.

We now proceed to the last error which we will notice in this connection.

7. That is as follows: "The court erred in receiving the verdict and in rendering judgment in this case for more than was claimed in the affidavit and declaration."

The note, which is mentioned in the verdict of the jury, is the same note mentioned in the affidavit and declaration on which this action was based. The verdict of the jury was clearly wrong, from the internal evidence which it bore on its face. The amount claimed in the affidavit was $221. No matter what might be claimed in the *ad damnum*. If it is clear that the jury only intended to find that the amount due the plaintiff was the face of the note, without interest, which we think is the case, there should have been no mistaking their intentions. The excess is but a small sum indeed, but it was the duty of the plaintiff and not

the defendant to see that the verdict was corrected at the proper time, and when these facts were brought to the notice of the court, it became the duty of the court to send the jury back to their room for the purpose of returning a correct verdict. We do not remember an instance where the court refused to have the verdict of the jury corrected for the reason that the excess was a trifling sum. The plaintiff in this case claimed in his declaration the amount of the note sued on, with such other amount as the jury might find due him not exceeding $300.

The jury only found the amount of the note without interest, and fixed the sum at $221.66. How they could find the amount of sixty-six cents over and above the note, when the note was found to be due without interest, is not known to us. The verdict was clearly wrong from the statement contained in the body of the same. Therefore the verdict was wrong for two reasons; 1, the excess over the face of the note, and in the second place it was against all the defendants, or, if we are mistaken in this, then the court could not enter judgment against all of the defendants. The reason why is stated in the former part of this opinion. There are other errors assigned by appellant which are worthy of notice, but, for reasons above given, we cannot examine them in detail here. We think that the authorities cited by appellant, and many of those also by the appellee, bear us out in arriving at the conclusion to which we have come, that the judgment of the court below must be reversed, which is done accordingly, with costs, and this cause is remanded for further proceedings.

Reversed.

TURNER v. HAHN.

1	23
2	354
1	23
18	48
1	23
19a	536

TROVER — *demand and refusal.* In the action of trover, proof of demand and refusal is made for the purpose of showing a conversion of the property by defendant, and, when the plaintiff is able to show such fact by other evidence, he need not resort to such proof.

NEW TRIAL — *verdict according to evidence.* The verdict of the jury in this case was according to the evidence, and a new trial was denied.

PRACTICE — *construction of a rule of court.* A rule of court, which requires that affidavits in support of a motion shall be served by copy upon the opposite party twenty-four hours before the hearing, does not comprehend affidavits read at the hearing on behalf of the party who resists the motion.

JUROR — *alienage of.* A verdict will not be set aside on account of the alienage of one of the jurors to whom no objection was made at the trial.

Appeal from District Court, Gilpin County.

AT the trial G. E. Guinn testified on behalf of the plaintiff, that on 9th of September, 1865, he sold and delivered to plaintiff seven head of beef cattle, one of which was a blue roan steer about four years old, which would weigh twelve hundred pounds gross, and six hundred pounds net, worth about $100. On the eleventh of September he understood the blue roan steer had broken out and was gone; that he inquired for the steer and noticed for him; that he purchased the steer of Gartin, a ranchman, in Boulder county about the 1st of August, 1865, and kept possession of him until he sold him to plaintiff; when he purchased the steer he was branded on left hip with letter F, and had his left ear cropt; witness branded him on left shoulder with the letter F. About the last of November, or first of December, 1865, witness saw the steer at defendant's slaughter-house in Central City; witness went with plaintiff to defendant's shop that night, and had a conversation with defendant about the steer; defendant said he purchased the steer 15th August, 1865, of Gartin, and that he branded all the cattle purchased of Gartin on the loins with the letter F. Plaintiff and defendant agreed to go the next morning and see the steer; witness and plaintiff went up the next day about 9 o'clock, A. M. Defendant said there was no need of his going, and told plaintiff he would not go; witness saw the hide and head of said steer in defendant's slaughter-house, and found the same brands on it; witness testified that it was the hide of the blue-roan steer; defendant purchased cattle of Gartin about two weeks after witness did; the

steer was of a peculiar color; never saw one before or since of such a color.

Defendant read the deposition of James B. Tourtellot, who testified that, on 6th of September, 1865, he took a steer from Gartin's ranch for defendant, and afterward turned him over to defendant; that the steer was a brindle with staggy horns; that on the 3d of September, 1865, Turner, the defendant, turned over to him to ranch, fourteen head of cattle, one of which was a roan or reddish roan steer, branded F on left hip, and F on left side between the hip and shoulder blade, pretty well up on the back; that he returned the steer to defendant, in the latter part of September or first of October, 1865.

Thomas Peacock testified, on behalf of defendant, that Tourtellot delivered the roan steer spoken of in his deposition on the 16th of October, 1865; that the steer was taken to Blackhawk, and thence to the Elk meadow ranch to pasture; that the steer was of a blue roan color, about four years old, staggish horns, weighed eight or nine hundred pounds gross; was branded just behind left foreshoulder, pretty high upon the back with letter F, had a circle on left hip with letter in it; could not tell what the letter was; steer would dress about four hundred pounds; next saw the steer on the Elk meadow ranch two weeks afterward; did not see the steer again until I saw him at the slaughter-house; I suppose that is the time spoken of by Guinn; knows it was the same steer delivered to defendant 16th October, 1865, by Tourtellot.

George Ritter, on behalf of defendant, testified, that on the 19th of October, 1865, he took four head of cattle to the Elk meadow ranch, and delivered them to Henry Ripley for defendant, the cattle were turned over to him by Thomas Peacock; one was a blue roan steer, marked F on left hip, and F right back of shoulder, four or five inches from back bone; he looked to be about four years old.

Henry Ripley, on behalf of defendant, testified, that he was the owner of the Elk Meadow ranch; that on the 16th of October, 1865, he received from George Ritter four head

of cattle to ranch and herd for defendant; that one was a roan steer; that on the 20th day of November, 1865, he drove the steer, together with other cattle, to defendant at Central City, and put the steer in defendant's close-pen at slaughter-house.

William Feld, on behalf of defendant, testified, that he saw the blue roan steer in the slaughter-pen, and that the steer, when killed, weighed four hundred and four pounds; that the steer was killed at defendant's slaughter-house at night, eight or ten o'clock; that he did not see any marks on the steer.

At the hearing of the motion for a new trial the counsel for defendant below read affidavits to show that Cyrille Harpin, one of the jurymen who sat at the trial, was not a citizen of the United States, and that he could not speak, write, read or understand the English language, except a few common and simple words, and that said Harpin was a citizen of Great Britain; that neither the defendant below nor his counsel had any knowledge of Harpin's alienage or of his ignorance of the English language until after the trial.

Counsel for plaintiff below offered affidavits to show that Harpin was well enough acquainted with the English language to converse therein, and that he did converse with his fellow jurors about the cause, and that they discovered in him no lack of understanding or of capacity to comprehend the same; that, during the progress of the trial, defendant's counsel was informed that Harpin was not a citizen.

To these affidavits counsel for defendant below objected, that copies had not been served upon him according to the following rule of court:

"In all motions, not being motions for continuance and not of course, twenty-four hours' notice of hearing shall be given, and such notice shall be in writing, and shall specify the objections and points raised by the motion, and, if the motion shall be founded upon affidavits, copies of such affidavits shall be furnished with the motion and notice."

The court allowed the affidavits to be read.

Mr. L. C. ROCKWELL, for appellant.

Mr. S. B. HAHN, for appellee.

HALLETT, C. J. This was an action of trover and conversion, in which there was judgment in favor of the appellee in the court below for the sum of $60 and costs. We are asked to reverse this judgment for several causes, the first of which is that improper instructions were given to the jury upon the trial in the district court. The objection to these instructions appears to be that they are so framed that the jury were at liberty to find for the appellee, in the absence of testimony showing a demand by him for the property, the value of which he sought to recover, and a refusal by the appellant to deliver it. Upon this point it is only necessary to say that, in actions of this kind, proof of demand and refusal is made for the purpose of showing a conversion of the property by the defendant, and, when the plaintiff is able to show such fact by other evidence, he need not resort to proof of demand and refusal. 1 Chitty's Plead. 157; *Tompkins* v. *Hale*, 3 Wend. 406.

In this case there was evidence tending to show that the appellant had killed the steer, the value of which the appellee was seeking to recover, and, if the jury believed this evidence, proof of demand and refusal was not at all necessary. It is also urged that the evidence is not sufficient to sustain the verdict; but we are unable to adopt the views of the appellant. We are entirely satisfied that the jury decided the case correctly. After the trial in the district court the appellant filed several affidavits showing that one Harpin, a juror who sat upon the trial, was an alien, and that he understood the English language but imperfectly; that the appellant and his counsel had no knowledge of these facts until after the trial. For this and other reasons, the appellant moved the district court to set aside the verdict and grant a new trial, which motion was denied. Upon the hearing of this motion the appellee produced the affidavit of one Geriaux, in which the deponent stated that during the trial of the cause he informed the counsel for

appellant of the facts before mentioned, touching the alienage and ignorance of Harpin, and also the affidavits of six of the jurors who sat upon the trial, in which they deposed that Harpin, while in the jury room, conversed freely about the evidence, and appeared to understand it perfectly, and they discovered no incapacity in him. To the reading of these affidavits, presented by the appellee, the appellant objected, alleging that, under a rule of the court which is set out in the bill of exceptions, he should have been served with copies of the affidavits twenty-four hours before the hearing, but the court permitted them to be read. Obviously the rule applies only to affidavits designed to be read in support of a motion, and, as these affidavits were offered for the purpose of resisting a motion, the case is not within the terms of the rule. It is clear that Harpin was sufficiently acquainted with the English language to enable him to comprehend the evidence and act intelligently upon it, and it is equally clear that he was an alien. We are then to consider whether the fact that Harpin was an alien is sufficient to avoid the verdict, and we think that it is not. In the case of *Queen* v. *Hepburn*, 7 Cranch, 297, it was objected that one of the jurors was not a resident of the county in which the cause was tried, and Chief Justice MARSHALL, speaking for the court, said "Whatever might have been the weight of this exception, if taken in time, the court cannot sustain it now, the exception ought to have been made before the juror was sworn." This language is fully applicable to the case under consideration. Parties have the right to interrogate persons who are called to sit as jurors, for the purpose of ascertaining their qualifications before they are sworn, and if this is not done the right to challenge is waived. *Hollingsworth* v. *Duane*, 4 Dall. 353; *Greenup* v. *Stoker*, 3 Gilm. 219.

We find no error in this record, and therefore the judgment of the district court is affirmed, with costs.

Affirmed.

1 29
4 329
1 29
12 525

SMITH et al. v. CISSON.

PRACTICE — *exception to ruling of court.* Error cannot be assigned upon the ruling of the court in giving an instruction to the jury, unless an exception to such ruling was entered at the time it was made.

EVIDENCE *as to identity of parties is for the jury.* Whether witnesses who use the surnames of parties to the suit refer to the parties, or to some other persons of the same name, is a question for the jury. If there is a doubt as to the identity of a person named by a witness, it is easily solved upon cross-examination, and, if the party, in whose favor the doubt will operate, fails to apply the test, there is strong ground for believing that he does not desire to dissipate the doubt.

PRESUMPTION *in support of judgment of court below.* In an action against two defendants named Smith, the record did not disclose whether the parties were sued as copartners or otherwise. At the trial the defendants put in an account in which they used the name of "Smith Bro.," and a receipt in which they were styled "P. Smith & *Co.*" Upon this evidence it will be presumed that the defendants were sued as copartners.

COPARTNERS *are bound by the act of one.* A contract by one of several copartners, in relation to the partnership business, is binding upon the firm.

NEW TRIAL — *where evidence is conflicting.* Where evidence is conflicting, and there is evidence upon which the verdict may stand, a new trial will not be granted, although another verdict might well have been given.

Appeal from District Court, Clear Creek County.

AT the trial below counsel for appellant asked for an instruction to the jury which the court declined to give, but no exception was taken to the ruling of the court.

Appellee sued appellants before a justice of the peace, and filed an account for three months' rent of a blacksmith shop, amounting to $45, and for work done as a blacksmith, amounting to $19.25, and also for damages in respect to the non-fulfillment of a contract relating to the rent of a blacksmith shop and tools, amounting to $269.50; the defendants put in an account for board, cash and other items, amounting to $155; in this account the defendants were styled "Smith Bro." The defendants also put in a receipt, covering several small sums of money, in which the defendants were styled "P. Smith & *Co.*" At the trial the plaintiff called Richard Rose who testified: I was called

to witness a bargain between Mr. Smith and Cisson. Smith rented shop and tools to Cisson for $15 per month; Cisson to sharpen mining tools for Smith, and, as part of the consideration, to keep the shop open for the accommodation of the public, that the reputation of the shop might not go down. Cisson was to have the shop until the first of March; contract was made in the last of October or first of November, A. D. 1866; Cisson was to sharpen the mining tools of Smith; it was mentioned such tools as Mr. Smith or his brother might use prospecting or other mining tools. There was an account between Mr. Smith and Cisson, in which Mr. Smith owed Cisson $45, this was to be allowed Cisson or three months rent; can't say whether or not this was the balance due from Smith to Cisson; don't know about Smith taking the tools; I know some tools were brought into Mr. Smith's butcher shop.

John D. Harris testified, that he rented the shop to Smith; that in November or December he notified Smith that he wished to occupy the shop; Smith told him he wished he would put Cisson out. Witness stated that he found the shop locked, drew the staple, and put out the tools.

Frank De La Mar testified, that Cisson commenced to occupy the shop in September or October; about the time Cisson commenced occupying it, I heard Mr. Smith say that he had rented him the shop for five months; that the shop, tools, profit and all was worth $7 per day.

George Cisson, the plaintiff below, testified, that the items in his account were correct.

Peter J. Smith, one of the defendants below, gave testimony as to the state of accounts between the parties, and stated that, according to his books, the balance due him from Cisson was $41.

The jury found for the plaintiff, and assessed his damages at $73.56, and judgment was rendered on the verdict.

Messrs. ROYLE & BUTLER, for appellants.

Messrs. POST & MORGAN, for appellee.

HALLETT, C. J. The appellants seek to reverse this judgment because the court below refused to give an instruction asked by them, and because the evidence is not sufficient to support the verdict. As to the first point, the appellants did not except to the ruling of the court in refusing to give the jury the instruction asked by them at the time such ruling was made, and, therefore, they cannot be heard. *Armstrong* v. *Mock*, 17 Ill. 166.

The witnesses who testified upon the trial below related the facts touching the renting of a blacksmith shop and other business transactions between Mr. Smith and Mr. Cisson, without giving the names of the parties more fully, and it is urged that it does not appear which one of the appellants was intended to be named by the witnesses, or indeed whether the witnesses intended to name either of the appellants.

We cannot doubt that the witnesses referred to one of the appellants when they spoke of Mr. Smith. Upon the stand witnesses use the language of ordinary conversation, and to require them to adopt a more perspicuous diction is neither practicable nor desirable. It is hard to believe that a witness may be produced in open court, and that he may there, in the presence of the parties, plaintiff and defendant, detail the circumstances of a business transaction between the plaintiff and a person of the surname of the defendant, without disclosing the fact that the defendant in the suit is not the person referred to by the witness, if such fact exists. Oftentimes the names of parties are used by witnesses without giving the full name, but in such way as to leave no doubt in the mind of the hearer as to the person designated by the witness. If there is doubt as to the identity of a person named by a witness, it is easily solved upon cross-examination, and, if the party in whose favor the doubt will operate fails to apply the test, there is strong ground for believing that he does not desire to dissipate the doubt. We think that the jury, in this cause, were at liberty to determine, as they did determine, that the witnesses, when speaking of Mr. Smith, referred to one of the

appellants. A more difficult question is presented concerning the joint liability of the appellants to the appellee in this action.

The testimony refers to but one of the appellants, and unless the act of this one is binding upon the other, the verdict cannot be sustained. It must be borne in mind that this action was originally commenced before a justice of the peace, and there are no written pleadings from which we may learn the character of the suit. For aught that appears the appellants were charged as partners, in which case the joint liability would be established, *prima facie*, unless denied by plea in abatement, and it is not claimed that such plea was interposed. *Warren* v. *Chambers et al.*, 12 Ill. 124.

Upon this point the witnesses give no light, but there is, in the bill of exceptions, an account and receipts which it is said the appellants presented and relied upon in the trial of the cause. In the account the appellants style themselves "Smith Bro.," and they charge the appellee an item of rent for a shop which appears to have been the blacksmith shop mentioned by the appellee's witnesses. The receipt also appears to have been given by the appellee to the appellants, to acknowledge payment of some of the items for which this suit was brought, and therein the appellants are styled "P. Smith & Co." One of the appellants, Peter J. Smith, having made the preliminary affidavit required by statute, testified in the cause respecting some of the items in the account. Now it appears from these papers that the appellants were seeking to establish a demand against the appellee in a copartnership name, and also to establish the payment by them as copartners of a portion of the appellee's demand, and we think in this way they admitted, not only that they were charged in the suit as copartners, but also that they were in fact copartners in business. *Macfarland et al.* v. *Lewis et al.*, 2 Scam. 344; *Rymer* v. *Cook*, cited in 22 Eng. Com. Law, 479, in note.

The copartnership being thus established, the contract of one was obligatory upon both of the appellants, and the

joint liability is sufficiently shown; as to the damages we see that the evidence is conflicting, and we think that another verdict might well have been given by the jury, but as there is evidence upon which this verdict may stand, we cannot disturb it.

The judgment of the district court is affirmed, with costs.

Affirmed.

MURDOCK *v.* TOWNSEND.

PRACTICE *in supreme court.* A defendant failed to join in error as required by rule of court, and the judgment was for that reason reversed.

Error to District Court, Arapahoe County.

The chief justice did not participate in the decision.

GORSLINE, J. A rule having been entered in this cause requiring the defendant in error to join in error, and the said defendant having failed to conform to the requirements of said rule, the judgment in this cause must be reversed and cause remanded.

Reversed.

ANDERSON *v.* SLOAN.

BILL OF EXCEPTIONS — *when necessary.* A motion for a new trial, and a motion to vacate a judgment, and affidavits in support thereof should be preserved in the record by bill of exceptions.

SHERIFF'S RETURN — *amendment of.* A sheriff may amend his return to a summons by leave of the district court, after the record of the cause has been removed into this court.

PRACTICE — *affidavits irregularly made.* Affidavits sworn to before the attorney of the party making them should not be received.

Error to District Court, Arapahoe County.

Mr. ALFRED SAYRE, for plaintiff in error.

1 33
2 618
5 127
11 556
B 33
14 301
1b 88
26 545

Mr. J. Q. CHARLES, for defendant in error.

The chief justice did not sit in this case.

GORSLINE, J. This was an action of trespass commenced by Sloan against Anderson and four others in the district court of Arapahoe county, but service of the summons was only had upon Anderson. The summons was returnable on the first Tuesday of December, 1865, being the first day of the December term, and was returned by the officer as served on Anderson, December 13, 1865. The cause was continued to the March term, at which term the default of the defendant was taken, and the plaintiff's damages assessed by a jury at $1,200; upon which final judgment was entered. At the same term the defendant Anderson moved the court for a new trial, and also to vacate the judgment for reasons given, and which motions were based upon affidavits. These motions were overruled. As the decision of the court in overruling the motion for a new trial, and the reasons assigned by the defendant for vacating the judgment, and also the affidavit presented are not preserved in a bill of exceptions, they form no part of the record, and cannot be considered in this court. *Van Landingham* v. *Fellows et al.*, 1 Scam. 233. At the December term, 1866, of the district court, the plaintiff moved that the sheriff have leave to amend his return, so that it should appear that the summons was served on the 30th day of November, 1865, instead of December 13, 1865. This motion was granted, and the return was amended accordingly. The record, as amended, was returned into this court at the adjourned July term, 1867. It is urged that the district court erred in allowing the sheriff to amend his return after writ of error sued out from this court. We think not. The cases are numerous where the misprisions of officers are allowed to be amended a long time after judgment and even when they were out of office. *Moore* v. *Purple*, 3 Gilm. 149; *Leonard et al.* v. *Hughill*, 2 Scam. 361.

We conclude that there is no error in the record, and the judgment of the district court must be affirmed.

Several of the affidavits used on the hearing of the motions in the district court were sworn to before the attorney of the party making them. This practice is wrong, and the court should have rejected them.

The judgment of the district court is affirmed.

Affirmed.

FRANKLIN v. UNITED STATES.

CONSTRUCTION *of section* 3 *of act of Congress of* 1790 *relating to crimes.* The Territory of Colorado is not a place or district of country under the sole and exclusive jurisdiction of the United States within the meaning of section 3 of the act of Congress of 1790. 1 Stat. at Large, 113.

JURISDICTION — *averment as to, in indictment for murder under act of Congress.* An indictment based upon section 3 of the act of Congress of 1790, in which it is alleged that the murder was committed "at the said county of Gilpin" without further description of the place, and without any averment as to the jurisdiction of the United States, is not sufficient.

Error to District Court, Gilpin County.

Mr. JOHN W. REMINE, for plaintiff in error.

Mr. GEORGE W. CHAMBERLAIN, United States District Attorney, for the government.

HALLETT, C. J. At the December term, 1864, of the district court of the first judicial district, sitting at Central City, Gilpin county, the plaintiff in error was indicted for murder, tried and convicted of that crime, and sentenced to be executed.

He prosecutes this writ of error to reverse the judgment of the district court, and, together with other causes, he assigns the following as error:

"The court erred in entertaining jurisdiction of the offense charged in the indictment, the said first judicial district of Colorado Territory not being in the sole and exclusive jurisdiction of the United States."

The indictment appears to be founded upon section 3 of "An act for the punishment of certain crimes against the United States," approved April 30, 1790, which is in the following words:

"If any person or persons shall, within any fort, arsenal, dock-yard, magazine, or any other place or district of country, under the sole and exclusive jurisdiction of the United States commit the crime of willful murder, such person or persons, on being thereof convicted, shall suffer death."

The principal question presented in this record is, whether the place where the crime was committed was, at the time of the offense, within the descriptive terms of this act, so as to give the district court jurisdiction of the offense. The indictment sets forth that the crime was committed "at the said county of Gilpin," without further description of the place, and without any averment as to the jurisdiction of the United States. If the act operates in the Territories in the same way as in the several States, and to no greater extent, in other words, if the act operates in this Territory only within forts, arsenals and other places where the United States have exclusive jurisdiction, in virtue of exclusive ownership, it seems to be necessary, under the act, to aver in the indictment and prove upon the trial, that the place where the crime is committed is within the descriptive terms of the statute. *United States* v. *Cornell*, 2 Mason, 62. As this indictment contains no averment whatever as to the jurisdiction of the United States it is fatally defective, unless the act recited has a more enlarged operation in this territory than in the several States. If, as has been urged, the entire territory is a place or district of country under the sole and exclusive jurisdiction of the United States within the meaning of this act, it ought to be sufficient to allege that the crime was committed in that part of the territory which is within the jurisdiction of the particular court in which the indictment may be presented. If such is the meaning of the law, this, together with the seventh section of the same act, is the law of homicide in

this territory, in force wherever the process of the court runs, and wherever the court has jurisdiction under any law, and, therefore, it is sufficient to allege that the crime was committed within the geographical limits which define the territory, over which the court has jurisdiction; in other words, within the county or counties within and for which the court is sitting. Therefore we must inquire whether this territory is a place or district of country under the sole and exclusive jurisdiction of the United States within the meaning of the law mentioned. We may find an answer to this inquiry in the sixteenth section of the act establishing this territory, which declares "that the constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said territory of Colorado as elsewhere within the United States." Within the several States, section 3 of the act of 1790 provides for punishing murder, where committed in a fort, arsenal, dockyard or the like place, owned by the general government, and the above-mentioned section of the organic act declares it shall have the same force and effect in this territory. It may be suggested that the words "force and effect," used in the organic act, refer to the penal power of the law, and were not designed to limit its operation to places owned by the general government as in the several States. But a law is presumed to be effectual to accomplish its purposes, and therefore it was not necessary to declare what force and effect the act of 1790 should have in this territory, except for the purpose of limiting the places within which it should obtain. If, by the terms of the act, it is in force in the territory, its power is declared in the language of the act itself, and the limitation in the organic act, that it shall have the same force and effect as elsewhere within the United States, can refer only to the places in the territory within which it shall operate. If then, in obedience to the sixteenth section of the organic act, we give section 3 of the act of 1790 the same force and effect in this territory which it has elsewhere in the United States, we shall apply it to murder

committed in forts, arsenals and the like places belonging to the United States and in the Indian country.

We may reach the same conclusion without referring to the sixteenth section of the Organic Act. In all its legislation, congress pursues the authority given in the constitution, and we may refer the section under consideration to the sixteenth clause of section 8, article 1 of that instrument. In that clause of the constitution, congress is invested with exclusive legislative authority over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of congress, become the seat of government of the United States, and like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings.

The description of places in the act is nearly the same as in this clause. The words, "fort, arsenal, dock-yard and magazine," are found in the act and in the constitution, and the words, "other place or district of country," occurring in the act, but not in the constitution, were probably inserted out of abundant caution, or probably they refer to the district of Columbia, which, at the time of this enactment, had no existence but was in contemplation. Of these words, the *Supreme Court in United States* v. *Bevans*, 3 Wheat. 390, say: "Congress might have omitted in its enumeration some similar place within its exclusive jurisdiction, which was not comprehended by any of the terms employed, to which some other name might be given; and, therefore, the words 'other place or district of country' were added." Beyond doubt, this law was enacted in execution of the power conferred in this clause of the constitution. Now there is nothing concerning the territories of the United States in this clause; it refers only to the federal seat of government, and to forts, arsenals, etc. The power to govern the territories of the United States is not derived from this clause of the constitution; that power is conferred by the clause of the constitution which enables congress to

make all needful rules and regulations respecting the territory belonging to the United States, or it arises out of the general right of sovereignty, which exists in the federal government. *American Insurance Co.* v. *Canter*, 1 Pet. 511. The law we are discussing is not more comprehensive than the clause of the constitution upon which it rests, and therefore this territory, as a territory, is not within its descriptive terms.

In several enactments, congress has shown its concurrence in this view. By act of June 30, 1834, section 25 (4 Stat. 733), it is declared:

"That so much of the laws of the United States, as provides for the punishment of crimes, committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country, provided, the same shall not extend to crimes committed by one Indian, against the person or property of another Indian."

The Indian country at that time comprised the greater part of the national territory, and congress found it necessary to extend the section we are considering to that country. If the territory of the United States had been within the terms of the law, it would have been in force in the Indian country before the act of 1834, and that enactment would have been unnecessary. The ordinance of 1787, for the government of the North West Territory, establishing the first of the territorial governments, contains the following clauses:

"The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to congress from time to time; which laws shall be of force in the district until the organization of the general assembly therein, unless disapproved by congress, but afterward the legislature shall have authority to alter them as they shall think fit."

"For the prevention of crimes and injuries, the laws to be adopted shall have force in all parts of the district, and for the

execution of process, criminal and civil, the governor shall make proper divisions thereof, and he shall proceed from time to time, as circumstance may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships; subject, however, to such alterations as may hereafter be made by the legislature."

Ample power was conferred upon the North West Territory to enact a full code of civil and criminal laws, subject only to the limitations contained in the ordinance itself. If the power should be abused, congress could disapprove the laws enacted, the right to do so being expressly reserved in the ordinance. By act of August 7, 1789 (1 Stat. 51), after the present constitution was adopted, congress continued this ordinance in force, but did not restrict the powers of the territorial government, and, therefore, those powers remained as before, with some changes not material to our present inquiry. This ordinance subsequently became the organic law of Illinois, Indiana, Michigan, Mississippi, and Alabama Territories, which were established after the act of 1790 was passed. The language of the ordinance above set forth, undoubtedly conferred authority to enact the law of homicide, and from this it sufficiently appears that congress did not propose to exercise that authority directly and by its own act. Congress certainly did not intend to confer upon these territories authority to do that which it purposed to do or had done itself, and which, being done by congress, could not be modified or in any manner affected by the territories. If the law under consideration was the law of homicide in Illinois and the other territories last named, why should congress confer upon those territories authority to legislate upon that subject? Any law enacted by either of those territories in virtue of such authority in that case, so far as it should correspond with the federal law, would have been unavailing, and so far as in conflict with the federal law, it would have been void because of its repugnance thereto. Indeed, we cannot conceive that congress would confer

upon any territory authority to legislate upon any subject upon which it had previously spoken in such territory. The fact that authority is given to a territory to enact laws upon any subject is convincing proof that, in the opinion of congress, no federal law obtains in such territory upon such subject. From the fact that congress conferred upon Illinois and the other territories last named power to enact a law of homicide, we may fairly infer that, in the opinion of that body, the act of 1790 did not provide such law for the government of those territories.

Again, in an act respecting Florida Territory (4 Stat. 164) in defining the jurisdiction of the superior courts of that territory, it is declared that they "shall have and exercise original and exclusive jurisdiction of all crimes and offenses committed against the laws of said territory, where the punishment shall be death." In this country murder is commonly punished with death, and we do no violence to language when we say that that crime was referred to in the clause we have cited. If so, the law of homicide in that territory was provided, not by the act of 1790, but by act of the territory. It appears to us that congress has always acted in the belief that the territory of the United States is not a place or district of country under the sole and exclusive jurisdiction of the United States, within the meaning of the law under consideration. An examination of the laws of the United States respecting the territories discloses the theory upon which congress has always acted, which is, that in the exercise of its undoubted right to govern the territories, that body, deeming it inconvenient or inexpedient to provide municipal laws for the territories, directly and by its own act, erected territorial governments, and delegated to them authority to enact such laws. *Leitensdorfer* v. *Webb*, 20 How. 176. Usually all restrictions upon the powers of a territorial government are found in the organic law by which it is established, but sometimes, as in the law punishing bigamy in the territories, and the law prohibiting slavery and some other acts, this rule has not been followed. In every instance in which congress has

provided a law for the government of the territories by its own act, the intention that such law shall operate within the territories is clearly expressed. Ample governmental powers being conferred upon the territories wherein congress withholds authority, or revokes the authority which it has before conferred, the intention so to do is plainly expressed.

Since the ordinance of 1787 was disused, the language in which legislative power has been conferred upon territories is similar to that found in our own act, which is:

"The legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act."

More comprehensive language than this could not have been used, and we cannot doubt that it was designed to confer as full authority as that used in the ordinance. Unquestionably the powers conferred upon territories recently established are as full and complete as were those of the territories established under the ordinance. As the power to legislate upon the subject of homicide was conferred by the ordinance, so also it is conferred by our own act, and this, as we have seen, excludes the notion that the law of homicide in this territory is to be found in the act of 1790. Whenever congress shall determine to enact municipal laws for the territories, upon any subject, we believe that as heretofore the intention so to do will be clearly expressed; that congress has not yet entered upon this work is entirely certain. We can find no law of homicide provided by congress to be enforced in this territory; whenever such law shall be enacted, it will be the duty of all officers of justice to obey and enforce its provisions.

The act of 1790 operates within forts, arsenals and like places within this territory, because such places are described in that act; and in the Indian country, because it is there made effectual by the act of 1834, and also because the sixteenth section of our organic act declares it shall have the same force and effect in all these places as

elsewhere within the United States, but we cannot say that the entire territory is a place or district of country under the sole and exclusive jurisdiction of the United States, as described therein. As the laws of congress can be better enforced than those of the territory, we would be glad to adopt a different view if it were possible to do so, but we cannot indulge our wishes or preferences in opposition to the law. It was said at the bar that, inasmuch as the greater part of this territory, including the county of Gilpin, was formerly Indian country, and at that time the act of 1790 was enforced therein, that act has remained in force notwithstanding the territory has ceased to be Indian country. It is not necessary to demonstrate the fallacy of this proposition. As the law attached because of the character of the territory, whenever the territory was divested of that character, it thereupon ceased to operate therein. It was also said that, at the time of the offense, Gilpin county was in fact in the Indian country. If so, the fact should have been averred in the indictment, and, in the absence of such averment, the court could not take jurisdiction upon that ground.

Because there is no averment in this indictment as to the jurisdiction of the United States in the place where the crime was committed, the judgment of the district court is reversed.

Reversed.

CASS *v.* DAVIS.

1 43
1 195
2 9
3 242
3 516
1 43
14 19
1 43
5a 229

JURISDICTION *of district and probate courts.* In civil cases, where the debt or sum claimed does not exceed $2,000, district and probate courts are of concurrent jurisdiction.

STATUTE *repugnant to Organic Act.* Sections 4, 5, 6, and 7, of the act of 1865, relating to probate courts (4 Sess. 98), which provide for appeals from probate to district courts, are repugnant to the Organic Act, and therefore inoperative and void.

APPEAL *from probate to district court.* The supreme court alone has revisory jurisdiction of the proceedings of probate courts, and an appeal will not lie from a judgment of a probate court to a district court.

Error to District Court, Arapahoe County.

DAVIS obtained judgment against Cass in the probate court of Arapahoe county, and the latter appealed to the district court, where the appeal was dismissed. The action of the district court was assigned for error.

The chief justice did not participate in the decision.

Mr. J. Q. CHARLES, for plaintiff in error.

Mr. ALFRED SAYRE, for defendant in error.

The chief justice did not sit in this case.

GORSLINE, J. The only question involved in this case is, whether appeals can be taken from the probate to the district courts. The cause has been very elaborately and ably argued, and is one, as relating to the appellate jurisdiction of the district courts, of very general interest. By section 9 of the original Organic Act, it was provided, that the judicial power of the territory should be vested in a supreme court, district courts, probate courts, and in justices of the peace, and in the same section it is further provided "that the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of the justices of the peace, shall be as limited by law," with the proviso, that probate courts and justices of the peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or when the debt or sum claimed shall exceed $100. It also provided, that writs of error, bills of exceptions and appeal, should be allowed from the district court to the supreme court under such regulations as shall be prescribed by law. It is contended by the plaintiff in error, that by the clause giving jurisdiction to the several courts, and that clause in the Organic Act extending the legislative power to all rightful subjects of legislation, consistent with the constitution of the United States and the Organic Act, that the legislature had the power to allow

appeals from the probate to the district court. To this conclusion we can see no reasonable ground of objection. There was nothing in the letter or spirit of the act to prohibit it — it would have been a rightful subject of legislation, and there can be no doubt, but that the legislature, if it saw fit, could have conferred that jurisdiction upon the district courts. In the year 1862, the territorial legislature memorialized congress to increase the jurisdiction of the probate courts. In 1863, congress, in answer to this memorial, passed an amendment to the Organic Act, which effected a radical change in our judicial system, at least, so far as the jurisdiction of probate courts is concerned. By the third section of the amendment it is enacted, that the probate courts shall not have jurisdiction in any matter in controversy in cases where the debt or sum claimed shall exceed the sum of $2,000, and in the same section it is further enacted, that the supreme, district, and probate courts respectively, shall possess chancery as well as common-law jurisdiction, and authority for the redress of all wrongs committed against the laws of the territory, affecting persons or property.

It will be seen from these enactments that the district and probate courts have concurrent jurisdiction in all civil cases where the amount in controversy does not exceed the sum of $2,000, at least in those places where the legislature see proper to confer the jurisdiction upon them. It is said that under these amendments the legislature can provide for appeals from probate to district courts. Possibly it may be so, but can any one suppose that it was the intention of congress so to legislate that appeals could be taken from one court to another of concurrent jurisdiction? There may be such a judicial system in some of the States, but I know of none. Supposing that the legislature should confer the increased jurisdiction contemplated by the amendment to the Organic Act upon all of the probate courts in the territory, what would hinder the legislature from providing for appeals from the district courts to the probate courts in all cases when the amount in controversy did not

exceed the sum of $2,000? The courts would have concurrent common-law and chancery jurisdiction, and I can perceive nothing to prevent the legislature from so providing if it thought proper, and yet I can hardly believe that it was the intention of congress to permit that appeals might be taken from a court of unlimited jurisdiction to one of a limited jurisdiction. It is further enacted, in the third amendment to the Organic Act, that writs of error, bills of exceptions and appeal, shall be allowed from the final decisions of the district and probate courts to the supreme court, under such regulations as shall be prescribed by law. It is contended by the counsel for the plaintiff in error that, because there are no negative words or words of prohibition in this clause, that there is nothing to prevent the legislature to provide for appeals in a manner or to courts different from that specified in the act.

But, in view of the extended jurisdiction conferred upon the probate courts in the same section, could such have been the intention of congress? The language of the act strikes me as equally strong and prohibitory, as if it read that writs of error and appeals should be allowed from the final decisions of the district and probate courts to the supreme court, *and to no other*. We have been referred to the cases of *Jackson* v. *Kemble*, 18 Ill. 580; *Burns* v. *Henderson*, 20 id. 264; and *Harrison* v. *Doyle*, 11 Wis. 283, as sustaining the doctrine that, when the constitutions of Illinois and Wisconsin had provided that the appellate jurisdiction should remain in one court, still it was competent for the legislature of those States to provide that appeals might be taken to another and different court. By the constitution of Illinois it is provided: "That the circuit courts shall have jurisdiction in all cases at law and equity and in all cases of appeals from all inferior courts." By another section it provides: "That the jurisdiction of the county courts shall extend to all probate and such other jurisdiction as the general assembly may confer in civil cases." Under this last section of the constitution, the legislature enacted that all appeals from decisions of

justices of the peace and police magistrates in Peoria county should be taken to the county court of that county.

In passing upon the cases referred to, the court say, that the word "shall," in the act of the legislature, should be construed to mean "may," in order that there should be no conflict between the act and the constitution, and then held, that, under the constitution and the law, appeals might be taken both to the circuit court and the county court of that county. It will be observed that, although the constitution conferred appellate jurisdiction on the circuit courts in all cases, still it also provided that the legislature might confer such jurisdiction upon the county courts as it deemed proper. One clause of the constitution was certainly as binding as the other, and the power given to the legislative assembly, to regulate the jurisdiction of county courts, was as great as that by which the jurisdiction of the circuit courts was provided for. I do not see that these authorities sustain the doctrine claimed for them.

The constitution of Wisconsin provides, that the supreme court shall have appellate jurisdiction only, and shall also have a general superintending control over all inferior courts. It also provides, that the circuit courts shall have appellate jurisdiction from all inferior courts and tribunals and a supervisory control over the same. In *Harrison* v. *Doyle*, above referred to, an appeal was taken from the county court of Milwaukee county to the supreme court, and it was urged, that the appeal should have been taken to the circuit court instead of the supreme court. The court held, that, as the constitution provided that the supreme court should have appellate jurisdiction co-extensive with the State, and the superintending control over all inferior courts, that the appeal was well taken. They held still further, that it was competent for the legislature to provide for the removal of causes by appeal from the county to the circuit court. Undoubtedly, if the legislature of that State had so provided, appeals could have been taken either to the circuit, or directly to the supreme

court. The constitution conferred appellate jurisdiction upon both courts, but it seems the legislature had not provided the manner of removing causes by appeal to the circuit court. This case certainly does not support the doctrine claimed for it, neither is it like the one at bar. Both in Wisconsin and Illinois, the appellate jurisdiction was expressly given or permitted to be given to two separate courts; by the Organic Act of the territory it is vested in the supreme court.

But there is authority, and that of the very highest, to support the view which we have taken as to the construction to be given to the third amendment to the Organic Act.

The constitution of the United States, in its distribution of powers, declares that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party." "In all other cases the supreme court shall have appellate jurisdiction." It will be noticed, that neither in the grant of original jurisdiction nor in that of appellate jurisdiction are there negative words or words of restriction or prohibition. By an act of congress the supreme court was authorized to issue writs of mandamus in certain cases therein specified. In *Marburg* v. *Madison*, 1 Cranch, 137 (Curtis edition), an application was made to the supreme court for mandamus under the law of congress above referred to. It was urged in that case, as it is in this, that there being no negative or restrictive words in the grant of jurisdiction, it was in the power of the legislature to assign jurisdiction to the court in other cases than those specified in the constitution. I can see but little difference in this case and in the case at bar. The constitution in its grant of jurisdiction contained no negative or restrictive words. The Organic Act of the territory in its grant of appellate jurisdiction contains none. Upon that part of the case Chief Justice MARSHALL says: "Affirmative words are often in their operation negative of other objects than those affirmed, and in this case a negative or exclusive sense must be given to them, or they have no operation at

all." The court in that case held, notwithstanding the law of congress authorizing it, that, under the constitution, it had no power to issue a writ of mandamus.

We think the judgment of the district court must be affirmed.

Judgment affirmed, with costs.

Affirmed.

CHRISTIAN v. TUCKER.

EVIDENCE — *not pertinent to the issue.* If evidence not pertinent to the issue is given to the jury, the court may upon motion withdraw it.

INSTRUCTIONS — *not applicable to the evidence.* Instructions, which cannot be applied to the evidence, should not be given to the jury.

Appeal from District Court, Arapahoe County.

AT the trial Thomas Maxwell testified that the plaintiff worked for defendant, at $45 per month, from November 10, 1865, to January 8, 1866.

William Thompson testified to the same facts, whereupon plaintiff rested. The defendant then called John Wanless, who testified as follows: "I know the defendant Christian; his wagon-master was arrested about the time testified to by the other witnesses; Tucker, the plaintiff, was arrested in December; he was arrested on the report of the wagon-master of Christian; wagon-master said two men in the train had started the report about the Indians; wagon-master told me who they were, but I do not think he told their names; he admitted he knew the report about Indians was false; I do not know who started the report."

The defendant asked said witness: "Do you know any thing further with regard to Tucker's connection with this report that caused the arrest?" The plaintiff objected to this question; the court sustained the objection; to which ruling of the court the defendant excepted.

Plaintiff moved to strike out the evidence of Wanless, which motion was sustained. The defendant asked the court to give to the jury the following instructions:

"1st. If the jury believe from all the evidence that the plaintiff in this case, while in the employment of Christian, conducted himself in such an improper manner in the discharge of his duties that Christian sustained damages on account thereof, these damages are a valid and good set-off against the demand of Tucker. 2d. A greater degree of caution and prudence was necessary on the part of Tucker in the discharge of his duties in such times and places as appear in the evidence in this case, than in ordinary times and places." And the instructions were not given.

Messrs. MILLER & MARKHAM, for appellant.

Mr. G. W. PURKINS, for appellee.

HALLETT, C. J. The appellee sued the appellant before a justice of the peace, to recover the value of services by him rendered in driving a team for the appellant, and obtained a judgment for $87. The appellant appealed to the district court, in which another trial was had, resulting in a judgment in favor of the appellee for the same sum. We have reviewed the proceedings of the district court in this cause, and we find no error therein.

The evidence of Wanless was not pertinent to the issue, and the court very properly withdrew it from the consideration of the jury. The question proposed to Wanless assumed the existence of a fact not shown by the testimony previously introduced, and, if this were not so, we fail to discover any connection between the subject-matter of the inquiry and the issue, which was being tried. The instructions asked by the appellant could not have been applied to the evidence given to the jury, and the court rightly rejected them.

The judgment of the district court is affirmed, with costs.

Affirmed.

1	51
2	495
2	603
1	51
16	97
16	325
1	51
18	490

COOK v. HUGHES.

BILL OF EXCEPTIONS — *when necessary.* The copy of a note attached to a declaration and inserted in the transcript of the record by the clerk is no part of the record. It should be embodied in a bill of exceptions.

PRESUMPTION *in support of judgment.* This court will presume that the evidence in the court below was sufficient to support the declaration, unless the contrary appear.

Error to District Court, Arapahoe County.

Messrs. PURKINS & COOK, for plaintiff in error.

Mr. GEO. F. CROCKER, for defendant in error.

HALLETT, C. J. This was an action of assumpsit brought by the defendant in error against the plaintiff in error, to the March term, 1867, of the district court of Arapahoe county. The plaintiff below declared upon a bank check for the sum of $800, made by the defendant below on the 27th day of December, 1866. The plaintiff in error did not appear in the court below, and there was judgment against him by default for the amount of the check. It is said that the proceedings of the district court were erroneous, for the reason that the check upon which the judgmen t was rendered was dated December 27, 1867, was not due at the commencement of the suit, and was not correctly described in the declaration. The check given in evidence is not before us, and, therefore, we cannot consider the questions here raised. The copy attached to the declaration, and that inserted in the transcript by the clerk, form no part of the record, and there is no bill of exceptions. *Martin* v. *Ehrenfels*, 24 Ill. 188; *Franey* v. *True*, 26 id. 184.

The declaration describes a check due and payable at the commencement of the suit, and, as the contrary does not appear, we presume that the evidence supported the allegations of the declaration.

The judgment of the district court is affirmed, with costs.

Affirmed.

CLARK v. RUSSELL.

CONSTRUCTION OF CONTRACT — *interest on promissory note.* Upon a note payable in thirty days, "with ten per cent interest per month," interest was allowed at the rate specified, until maturity, and, after maturity, at the rate of ten per cent per annum.

Error to District Court, Gilpin County.

Mr. L. C. ROCKWELL, for plaintiff in error.

Messrs. JOHNSON & TELLER, for defendant in error.

HALLETT, C. J. This action was brought upon a promissory note, of which the following is a copy:

"$95.27. Thirty days after date, I promise to pay A. S. Carpenter, or order, the sum of ninety-five dollars, 27-100, for value received, with ten per cent interest per month.

"B. O. RUSSELL,
"THOMAS SMITH."

Nevada, K. T., *November*, 26, 1860.

There was judgment below for the plaintiff, and the court in assessing the damages computed interest at ten per cent per month, from the date of the note until it fell due, and, after the note was due, at the rate of ten per cent per annum. This is assigned as error, the plaintiff alleging, that he is, by the terms of the note, entitled to interest at the rate therein specified, from the date of the note up to the time the judgment was entered. In the absence of any agreement, the legal rate of interest in this territory is ten per cent per annum, and, as the plaintiff claims a higher rate, namely, ten per cent per month, of course he rests his claim upon the language of the note.

We cannot distinguish this case from *Brewster* v. *Wakefield*, 22 How. (U. S.) 118. The Minnesota act referred to in that case is substantially the same as our own, except as to the rate of interest in the absence of agreement, and the facts in that case raised the question we are now considering. The supreme court, speaking of the notes upon which

that action was founded, and which, as to the stipulation for interest, were the same as the note upon which this action is founded, say: "The contract being entirely silent as to interest, if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract." This lays down the correct rule adopted by the district court in computing the interest in this case, and no error was committed by that court.

The judgment of the district court is affirmed, with costs.

Affirmed.

---

1 53
2 627
3 244

REMINGTON et al. v. SMITH.

JURISDICTION OF PROBATE COURTS *in equity*. Probate courts were deprived of equity jurisdiction by the act of February 8, 1865 (4 Sess. 97), and a decree rendered after that date, in a cause which was pending at the time the repealing act was passed, was reversed.

Error to Probate Court, Jefferson County.

The chief justice did not sit in this case.

Mr. ALFRED SAYRE, for plaintiffs in error.

Mr. S. E. BROWNE, for defendant in error.

GORSLINE, J. This is a suit in equity commenced by bill filed in the probate court of Jefferson county, on the 25th day of November, 1864. By the Organic Act, and by a law of the territorial legislature, approved March 11, 1864, the probate court of Jefferson county was clothed with equity jurisdiction concurrent with that of the district court, where the debt or sum claimed did not exceed the sum of $2,000. A decree was rendered in favor of the complainant, agreeably to the prayer of the bill, on the 7th day of June, 1865. Various causes are assigned for error, but I think it necessary to notice but one. By an act of the legislature, approved February 8, 1865, the equity juris-

diction of the probate courts was taken away, except in certain cases therein specified. This case does not come within the limitation expressed, and after the passage of the act all proceedings in the probate court should have ceased, as its jurisdiction was gone. *Butler* v. *Palmer*, 1 Hill, 324; *Illinois & Michigan Canal* v. *City of Chicago*, 14 Ill. 334.

The decree of the probate court must be reversed.

Reversed.

TODD et al. *v.* SIMONTON.

PRACTICE IN CHANCERY — *bill to enforce vendor's lien — decree.* A contract for the sale of land was made, but the land was not conveyed. Upon bill filed by the vendor to enforce a lien for the purchase-money, it was error to decree a sale of the land.

The proper practice in such case is to require the vendee to pay the money due upon the contract within a specified time, or in default thereof that he be foreclosed of all equity of redemption in the premises.

Appeal from District Court, Arapahoe County.

The chief justice did not sit in this case.

Mr. J. Q. CHARLES, for appellant.

Mr. ALFRED SAYRE, for appellee.

GORSLINE, J. The complainant in the court below, Thomas H. Simonton, filed his bill, in which it is stated that, on the 28th day of January, 1861, he entered into a written contract with the defendant Todd, by which he agreed to sell to Todd a tract of land situated in the counties of Arapahoe and Jefferson, and containing about 160 acres, for the sum of $1,200, which was to be paid on or before the 1st day of September, 1861, when the complainant was to execute to Todd a good and sufficient deed in fee simple for the premises, and Todd was to take immediate possession of the claim; that, on or about the 25th day of November, 1861, Todd, with intent to cheat and defraud the

complainant, pretended to sell and convey said premises to the defendant, Albert Stout, and that Stout had full notice of the manner in which Todd had acquired possession of the premises and of the title of the complainant thereto. The bill further states, that the defendant Todd went into possession of the land, and remained in possession until he sold to Stout, when he took possession of the same. The bill further states, that the sum of $1,200, which was agreed to be paid for the purchase of said premises, has not been paid, but is still due. The bill prays, among other things, that the defendants be decreed to pay to complainant the amount found to be due him on the contract, or, in default thereof, that he be decreed to have a lien on the premises for said amount, and that, in default of the payment of the sum found to be due the complainant, the premises, or that portion situated in the county of Arapahoe, be sold under the order of the court, and the proceeds applied to the payment of the amount found due to complainant.

To this bill the defendants demurred, which demurrer was overruled; but, as the principal cause of demurrer is the same as the principal errors assigned, we will consider them together. The defendants answered, admitting most of the statements in the bill, but denying all knowledge on the part of Stout of the manner in which Todd had acquired possession of the claim, also denying that the complainant had any right or title to the premises, and admitting that the said sum of $1,200 had not been paid.

To this answer there was a replication, and proofs were taken before a master which we think unnecessary to notice. The decree of the district court was in accordance with the prayer of the bill, that the complainant have a lien on the premises, and that, in default of payment of the amount found due on the contract and the costs of suit, the premises be sold, and out of the proceeds of the sale the complainant's debt and the costs be paid, and the surplus, if any, be paid to the defendant Stout, and that the master should execute and deliver to the purchaser, at such sale, a good and sufficient conveyance of the premises which

should operate to convey all the right, title and interest of the defendants in and to the same.

This decree, we think, was erroneous. The relation of the parties to this contract is analogous to that of equitable mortgagor and mortgagee, and there can be no doubt that a court of chancery has jurisdiction to relieve the vendor as well as the vendee. In a contract of this nature, the lien which the vendor has is in the nature of a mortgage. 1 Wash. on Real Prop. 540. As the title did not pass to the vendee by the contract, but remained in the vendor, there was really nothing to sell, and the purchaser at the master's sale would obtain nothing. The proper decree in such cases is, that the vendee pay the money due upon the contract in some time to be specified in the decree, or, in default thereof, that he be foreclosed of all equity of redemption in the premises. 5 Wis. 598. There were other questions touching the title to the premises which we have not examined, thinking, perhaps, that, as the tenure by which lands are held has been changed since the making of this contract, it has become unnecessary.

Decree reversed and cause remanded.

Reversed.

---

1 56
20 343

FITZGERALD v. THE PEOPLE.

VENUE, CHANGE OF — *sufficiency of petition.* Where several counties are attached for judicial purposes, a petition for change of venue, founded upon prejudice of the inhabitants, must show that such prejudice exists in all of the counties so attached.

SAME — *second application.* A second application in the same cause, for change of venue, is addressed to the discretion of the court, and error cannot be assigned upon refusal to grant it.

JUROR — *competency of.* A juror having expressed himself strongly against the accused before trial, the fact was brought to the attention of the court upon motion for a new trial. *Held*, that a new trial should have been allowed.

Error to District Court, Arapahoe County.

INDICTMENT for murder upon which the prisoner was found guilty. The counties of Weld and Douglas were attached to the county of Arapahoe for judicial purposes. Previous to the trial in the court below, the prisoner moved for a change of venue, upon a petition setting up that the inhabitants of Arapahoe county were prejudiced against him, but no mention of the counties of Douglas and Weld was made in this petition. The motion was denied, and the prisoner then filed an amended petition, in which he alleged that the inhabitants of all the counties above named were prejudiced against him.

The motion for new trial was supported by the affidavit of Geo. Shallcross, of which the material part is given in the opinion of the court.

Messrs. PURKINS & COOK, for plaintiff in error.

Mr. V. D. MARKHAM, for defendants in error.

EYSTER, J. (after stating the facts). On his first assignment of error the plaintiff avers that there was error in the refusal of the court below to allow him a change of venue on his first petition and affidavit. Upon an examination of his petition, we find, that he sets out *only*, that there is such a prejudice in the minds of the people of *Arapahoe County* against him, that he cannot there expect a fair and impartial trial. If there had been then no other counties attached to Arapahoe county for judicial purposes, this petition and affidavit would have been sufficient, and it would have been error in the court below to have refused to grant it. But at that time the counties of Weld and Douglas were attached to the county of Arapahoe for judicial purposes and, in pursuance of law, jurors were drawn from those counties as well as from Arapahoe county to make up the panel of jurors, and although his petition complied with the letter of the law, we do not think it complied with its spirit, and we can see

no error in the action of the court below in that behalf. The next assignment of error is, we think, equally groundless. After the refusal of the court below to allow a change of venue, on the first petition presented, for the grounds above stated, the plaintiff in error filed a second and amended petition for a change of venue, in which he supplied the omission of his former petition, by adding thereto the counties of Douglas and Weld, and alleged the existence of the prejudice complained of in his first petition. This was only an amendment of his first petition. A change of venue under our statute, when properly applied for, is a matter of right, and is of course. The second application was addressed to the discretion of the court, and, we think, was properly so addressed, and we can see no error in its refusal in this instance to grant the motion.

The third and last error is of a more important character. That the court below erred in denying the motion for a new trial, when it was shown that one of the jurors who sat upon the trial was biased and prejudiced against the plaintiff in error, and had formed and expressed an opinion of his guilt before he took his oath and seat as a juror.

This exception, under all the circumstances in this case, we think is a good one, and on it this judgment must be reversed. Trial by jury is of most ancient origin. It has always, in all ages and countries where it has been adopted and used, been esteemed and held to be one of the most cherished and carefully guarded rights of the people. In *magna charta* the right of trial by jury was as earnestly and as determinedly insisted upon as the great right of *habeas corpus*, and the people of England were no less jealous and watchful in guarding and protecting the purity of the jury box than they were determined and earnest in asserting it as a great popular right. It is, in the words of an eminent English author, "the palladium of the civil rights of the people," and it is the boast of her people that their parliaments and their courts have always directed their best efforts to maintain its purity. In our own land

of boasted liberty, trial by jury is one of the great constitutional land-marks, and any violation of the purity of its sacred precincts is looked upon by all as a great crime. Common custom and the sanction of the law permits a party in a suit to have a juror solemnly sworn to make true answers to such questions as may be asked of him touching his competency as a juror; and, before he is permitted to be sworn as a juror in the particular cause, he is required, under the solemnity of an oath, to answer all such reasonable and proper questions as may be put to him touching his interest, bias or affection in the cause, as to the parties. If, upon such examination, it appears that the juror is, from any cause, under any influence of fear, favor or affection, or that he has in any way and on any cause made up an opinion as to the merits of the cause, he is justly and properly set aside by the court as an incompetent juror in that cause.

An examination of the facts complained of in this cause reveals to us that the juror, William Morgan (to whom objection was made), was in the neighborhood of the place where the homicide occurred at the time of its occurrence, and that he had heard from different parties a narration of the facts in the case. He declares that, from what he had heard of the transaction, he had formed and expressed an opinion as to the guilt or innocence of the accused. The juror, on being further interrogated, stated, that he thought he could give the prisoner a fair trial, and, to a further question, he answered that he could give the accused a fair and impartial trial without being influenced by that opinion. Whether the refusal to permit this juror, under such circumstances, to be set aside for cause, was error to reverse the judgment, we will not here decide, but, coupled with what was made apparent to the court on the motion for a new trial by the affidavit of Shallcross, we think that there was error in the court below in refusing to allow the plaintiff's motion. Shallcross swears that, on the morning of the day of the trial and before the jury were impaneled in the cause, "I heard William Morgan express strong conviction

of the defendant's guilt; one of the expressions he used was this: 'I would hang the son of a bitch on the evidence I already have, unless stronger testimony than I have heard could be brought in his favor,' and numerous other sentiments of a like import that I cannot now remember."

Such expressions, we think, exhibit malignity and vindictiveness on the part of the juror toward the accused, inconsistent with the purity required in the jury box, and we think that when the defendant stood before the court with that uncontradicted affidavit in his hand, and from the verge of the grave appealed for a trial in his cause by an impartial jury, it was his right to be heard, and the refusal to grant him that right was such error as requires us to reverse the judgment of the court below, which is done, and the cause is remanded and a new trial awarded.

Reversed.

GILE v. THE PEOPLE.

INSTRUCTIONS *must be written*. Instructions to the jury must be written, and it is error to give them orally.

INDICTMENT. SURPLUSAGE. An indictment for assault with intent to murder, in which the word "*feloniously*" is unnecessarily used, is good.

Error to District Court, Arapahoe County.

HALLET, C. J., did not participate in the decision.

Mr. GEO. F. CROCKER, for plaintiff in error.

Mr. J. Q. CHARLES, for defendants in error.

GORSLINE, J. The plaintiff in error was indicted at the December term, 1865, of the district court of Arapahoe county, under section 48 of the Laws of 1861, on page 298, for an assault with intent to commit murder, which was embraced in the first count of the indictment, and also for an assault with a deadly weapon, with intent to inflict a bodily

injury, which was contained in two separate counts. The cause was tried at the same term before Justice Gale, then the presiding judge, and a jury. The defendant was convicted under the second and third counts, and acquitted under the first count. There were a great number of instructions asked for by the defendant (twenty-two in number), which could only have been intended to mystify and perplex the jury. This is a practice which cannot be too strongly condemned. We regret that we cannot affirm the judgment of the district court, for we think, from the evidence given on the trial, that the assault was an aggravated one, and without any considerable provocation, and that substantial justice was done.

But the bill of exceptions shows that, after the court had given instructions to the jury in writing, he further gave them some instructions orally. The statute of 1861, page 282, section 28, provides, "that the district court in all cases, both civil and criminal, shall only instruct the petit jury as to the law of the case, and such instructions shall be reduced to writing, and may be taken by the jury in their retirement.

This statute is mandatory, and we must submit to it so long as the legislature suffers it to remain a law. *Ray* v. *Wooters*, 19 Ill. 82. It is urged by the counsel for the plaintiff in error that the instructions were not given verbally to the jury, but that the court read to the jury from the statute the definition of malice. Even if that could obviate the difficulty, still the record does not so allege the fact to be, for it states that the instructions were given orally, and that the defendant below excepted for that reason. One object of the statute doubtless is that the jury may have all the instructions before them when they retire to consider their verdict, and in that view it can make but little difference whether instructions are given orally or read from a book, for, in either case, they would be equally liable to forget them.

The defendant below moved the court to arrest the judgment, because the indictment charged in the second and

third counts that the assault was made feloniously, whereas by the statute such assault is only made a misdemeanor.

The statute does declare that such an assault shall be adjudged a high misdemeanor. It is said in the books that every felony includes a high misdemeanor, but probably the converse of the proposition would not be true. However, the word "feloniously" may be regarded as surplusage, and not vitiate the indictment. *Hess* v. *State of Ohio*, 5 Ham. 12.

The judgment of the district court is reversed and the cause remanded.

Reversed.

FORD GOLD MINING CO. *v.* LANGFORD et al.

1 62
3a 382

PRACTICE IN LIEN CASES. Under the Mechanics' Lien Act of 1864 (3d Sess. 102), all creditors interested in the premises to be charged may have their claims adjusted in one suit.

The better practice for creditors, who seek to establish a lien in a pending suit, is to file a bill in the nature of a cross-bill setting forth the facts respecting the lien in the same way as if the bill were original, and making the debtor and all other parties to the suit defendants therein.

In whatever way creditors, who are defendants in the bill, are allowed to assert their demands, they must observe the same strictness in pleading that is required of the party who institutes the suit.

If a defendant creditor sets up a lien in his answer, an opportunity should be afforded the debtor and all other parties to the suit to resist his demand.

If the debtor and the other parties fail to answer his allegations within the time fixed by the court, there should be an order taking the answer as confessed, and the subsequent proceedings should be the same as upon a bill.

ANSWERS INSUFFICIENT. The answers in this case are insufficient to support the decree in not showing, 1st. The time when the contracts were made; 2d. The kind of labor performed; 3d. The quantity of materials furnished; and they contain no prayer for relief.

ANSWER *without oath*. It may be doubtful whether complainants can deprive defendants of the benefit of their oaths in this proceeding. But if the oath is waived and the answer is put in without oath, there is no ground for complaint.

Although the sufficiency of the bill was not questioned, the decree was wholly reversed, in order that the district court might have full control of the cause.

Error to District Court, Gilpin County.

Messrs. REMINE & HULETT, for plaintiff in error.

Mr. E. T. WELLS, for defendants in error.

HALLETT, C. J. Langford, Marshall and the Lees commenced proceedings in the district court of Gilpin county to enforce a mechanics' lien upon certain property of the plaintiff in error. Under a charge that they had, or claimed to have, some interest in the premises or a lien thereon, several persons were made defendants in the bill with the plaintiff in error, and the oaths of defendants to their answers were waived. Some of the defendants answered under oath, and others without oath, responding to the allegations of the bill, and asserting liens upon the premises therein described. The bill was taken as confessed, and a decree was entered in favor of the complainants therein and in favor of those defendants who, in their answers, claimed liens upon the premises, establishing such liens.

It is assigned for error that there was no service upon the plaintiff in error in the court below, but this was not relied upon in argument, and we have not discovered any defect in the service.

Other questions are presented by the assignment of errors, but we shall notice those only which relate to the sufficiency of the pleadings.

This proceeding is founded upon the act of 1864, to create a lien in favor of mechanics and others in certain cases. By the twenty-fifth section of the act it appears that, in suits instituted under its provisions, all persons interested in the property charged with the lien may be made parties, and if they are not made parties, by the nineteenth section they may, on application to the court at any time before judgment, become parties. By the twenty-fourth section, creditors are allowed to contest each other's right as to the lien and as to the amount due, and, by the tenth section, lien creditors are to share *pro rata* in the proceeds of the property, and the court is to ascertain what amount shall be paid to each.

From these and other provisions of the act, it appears that all creditors who are interested in the premises to be charged with a lien may have their claims adjusted in one suit. The party who initiates the proceeding is required to commence by bill or petition containing a brief statement of the contract or agreement out of which the lien arises, a description of the premises subject to the lien, the amount claimed to be due, and all facts necessary to establish the lien under the act. In what way creditors, who are made defendants to the bill, or who become parties to the suit upon their own application, are to proceed to establish their demands, is not pointed out by the statute.

In the State of Illinois, under a statute containing provisions similar to those we are considering, it seems that lien creditors are allowed to assert their demands in a suit pending by answer and by what is singularly and, perhaps, inappropriately called a bill of interpleader. *Power et al.* v. *McCord et al.*, 36 Ill. 214; *Martin et al.* v. *Eversal et al.*, id. 222.

In whatever way lien creditors, who are made defendants in the bill, are allowed to assert their demands, it seems to us that they ought to be held to the same strictness in pleading that is required of the party who institutes the suit. All creditors ought to stand upon the same footing, and, whether they are complainants or defendants, they should establish their demands according to the statute. Perhaps the pleading adopted by a creditor who seeks to establish a lien in a pending suit is not material to the rights of the several parties in interest, but we think that much confusion may be avoided by requiring every such creditor to file a bill in the nature of a cross-bill, setting forth the facts respecting the lien in the same way as if the bill were original, and making the debtor and all other parties to the suit defendants therein. In this mode of proceeding an opportunity would be given the debtor and all other parties to contest the petitioner's right to recover, and this opportunity must be given in whatever way the claim is asserted. We are not prepared to say that a defendant, who is a lien creditor, may not present his lien in his answer,

but if he do so, as to the lien, his answer must be substantially a bill. He must set forth the facts upon which he relies to establish his lien with the same particularity as if the proceedings had been instituted by him. He must require the debtor and the other parties to the suit to answer his answer, and he must regularly pray for the relief which he seeks. If the debtor and the other parties fail to answer his allegations within the time fixed by the court, there should be an order taking the answer in which the lien is set up as confessed, and the subsequent proceedings should be the same as upon a bill. In no other way can an opportunity be given the debtor and the other parties interested in the premises to resist the demand which the petitioner seeks to establish, and the right so to resist is secured to them by the statute and rests upon the principles of justice.

The defendants, who sought to establish liens in this action, have not, in their answers, stated sufficient facts to sustain the decree. In no instance is the time when the contract or agreement was made stated in the answer. In those cases in which the parties claim a lien for labor performed, there is a general allegation that lábor was performed in erecting and constructing the mill. This is not sufficient. The court should be informed whether the party labored as carpenter, mason or otherwise, in order that it may be seen whether he is entitled to a lien. In the answer of Bell & Scott, the quantity of fire-brick clay and tile furnished by them is not stated. There is no prayer for relief in these answers. The parties ask that the court will protect their rights, but they do not ask that their liens may be established, that the amounts due them may be ascertained, or that the premises may be sold. Possibly a careful examination would reveal other defects in these answers, but it is unnecessary to look further. It does not appear that any opportunity was given the plaintiff in error to contest the liens set up in these answers. These defendants, who claimed liens, equally with the complainants in the bill, were seeking to establish demands against the plaintiff in error. Nominally defendants, they were, in

fact, complainants, and should have been regarded as complainants in so far as their action was adverse to the plaintiff in error.

It is assigned for error, that some of the answers of defendants were put in without oath. Under this statute, it may be doubtful whether complainants, by waiving the oath of defendants to their answer, can deprive defendants of the benefit of their oath if the defendants put in their answer under oath. If complainants waive the oath, and defendants accept the waiver by putting in the answer without oath, it is difficult to perceive upon what principle the proceedings can be regarded as erroneous. By consent of parties, an answer may be put in without oath, but an order of the court should be obtained for that purpose. 1 Daniel's Ch. Prac. (3d Am. ed.) 748. No order of the court, allowing the defendants to answer without oath, was obtained in this cause, but, as the court received and acted upon the answers, probably we should not, for that reason alone, reverse the decree. What we have said upon this point applies to those portions of the answers only which are responsive to the complainant's bill. We have seen that, in so far as the answers relate to the liens of the defendants, they are in the nature of bills of complaint. Now the statute does not require that the bill shall be sworn to, and when the lien is set up in another pleading, there is no greater reason why the pleading should be under oath than when the lien is set up in a bill.

Because of the insufficiency of the answers in respect to the substantial allegations therein, this decree must be reversed. No question is made in the assignment of error as to the sufficiency of the bill, and we are asked to affirm the decree as to the complainants therein. We think that the cause should be fully under the control of the court below, that the rights of all parties may be adjusted, and therefore the decree is wholly reversed and the cause remanded for further proceedings according to the views herein expressed.

Reversed.

1 67
1 293
2 376
3 278
1 67
12 296
1 67
25 504
1 67
29 157

JONES et al. v. STEVENS.

PRACTICE — APPEARANCE *cures defective summons.* Defendants who appear and move a continuance of the cause waive defects in the summons.

PRACTICE — DAMAGES *must be assessed by jury in certain cases.* In an action of trespass to recover damages for diverting water from an irrigating ditch, if the defendants are defaulted, the damages must be assessed by a jury.

Error to Probate Court, Jefferson County.

HALLETT, C. J., did not participate in the decision.

Mr. J. B. SMITH and Mr. G. F. CROCKER, for plaintiffs in error.

Mr. ALFRED SAYRE, for defendant in error.

Per CURIAM. The defendant in error, who was the plaintiff below, brought his action to the January term, 1865.

At that term, the defendants below appeared and moved the court to continue the case upon affidavit filed, which continuance was granted at the costs of the applicants. At the February term following, the plaintiffs in error filed a motion to dismiss the cause, which was overruled by the court. The case was then continued at the instance of the court. At the April term following, the attorneys of Jones came and withdrew their appearance, whereupon the attorney of Stevens took judgment for want of a plea, and the court proceeded to assess the damages without having summoned a jury for that purpose.

It is claimed by the plaintiffs in error, that the original writ having been signed by A. O. Patterson, as deputy to the county clerk, Carpenter, is void because no deputy was authorized to act in this behalf as clerk of the probate court. We do not think it necessary to inquire into this question, because whether the process was void or voidable only, inasmuch as the plaintiffs appeared in the cause and moved a continuance of the case, they must be held to have waived any irregularity in the process. The purpose of

process, like that of a summons, is to bring the parties into court and advise them in brief of the nature of the proceedings against them. It is essential that objection be made to the process at the earliest time when they shall appear in court in response to the summons. If they can take any other steps in the cause, and claim afterward to object to the validity of the process, they can do so through all the stages of the cause up to the time of the verdict, until the error or irregularity will be cured by the verdict. Here they moved a continuance upon affidavit and it was allowed.

In the interval between the terms of the court, an *alias* summons might have been obtained, and the parties brought into court by process not liable to the objection insisted upon. The case in 6 Blackf. 557, appears to have been decided upon the ground that a voluntary appearance can be withdrawn at any time, a doctrine condemned by a majority of the court in *Dana et al.* v. *Adams*, 13 Ill. 693. In this case the appearance was withdrawn, and we are urged to presume that the withdrawal was with the leave of the court. But we incline to think that there was no leave of the court given in the premises, but that the court recorded the withdrawal as a faithful record of the proceedings, without either assenting or denying the right of withdrawal. The defendants below took all the responsibilities of their own act, and not having asked the leave of the court to withdraw their appearance, it must be presumed they did it at their own responsibility as to the consequences.

In the case of *Easton et al.* v. *Altum*, 1 Scam. 250, and authorities there cited, it is held, that whether the writ be void or not, the defendant took such steps that he was regularly in court whether there was process or not.

The next point claimed as error is, that the court proceeded after judgment, in default of a plea, to assess the plaintiff's damages without a *venire* for a jury. In all cases at common law, where judgment is entered upon default, a writ of inquiry was necessary to ascertain the measure of damages due to the party complainant. Our

statute, section 6, acts of 1861, page 279, so changed the common-law rule as to permit the clerk to assess the damages in cases where the action is brought upon an instrument in writing for the payment of money only, and when the damages rest in computation. In this case the suit was brought to recover damages in an action of trespass on the case for obstructing and diverting a water-course or ditch from the lands of Isaac Stevens. The act of the legislative assembly of 1864, section 6, page 118, provides, that the probate courts shall be governed by the rules of practice prescribed for the district courts, and the rule of practice in the assessment of damages in the district court by the clerk is limited to cases where the action is brought upon a penal bond or an instrument of writing for the payment of money only, resting in computation.

But it is claimed that, by the tenth section of the act concerning probate courts and justices of the peace in certain counties (page 119, Sess. Laws of 1864), that no jurors shall be summoned to the terms of the probate courts as is required before the district courts, but that, in all cases, if either party shall demand a jury, a *venire* shall issue as in cases before justices of the peace.

We cannot think that this section can be construed to authorize the assessment of damages by the clerk or the court in any other cases except when the damages rest in computation as heretofore mentioned. It was obviously the duty of Stevens to demand a jury in a case where the clerk, or the court acting as its own clerk, could not assess the damages by the practice or rules of the common law. Stevens, not having demanded a jury, as he had a right to do, to assess the damages, and the court, without authority by statute or common law, having done so, is clearly error.

The probate court, by the terms of the amendatory act of 3d March, 1863, possessed full common-law jurisdiction. A *venire* to the sheriff to have a jury to assess the damages of Stevens, according to the practice of the courts of common law, was the true mode of procedure in this case, because the defendant, Jones, could not be taken to have

waived the assessment by a jury, inasmuch as he was not present in court contesting the case. The act of 1864, tenth section, only provides that no jurors shall be summoned to the *terms* of the probate court, etc. We think that, in the absence of the defendants, Stevens should have demanded a jury, not in virtue of the tenth section aforesaid, but under the practice of the district courts, as is provided in section 15 of the practice act, and that, without that demand, it was the duty of the court to have awarded the *venire*. When both parties are present in court, and neither demand a jury to assess the damages, and defendants tacitly submit to the finding of the court without objection, is quite another question.

By the Court. Judgment reversed with costs, and cause remanded.

Reversed.

---

1 70
26 545

KURTZ v. SIMONTON.

BILL OF EXCEPTIONS — *when necessary.* Instructions to the jury and a motion for new trial must be preserved in the record by bill of exceptions, and, if not so preserved, error cannot be assigned upon them.

Error to District Court, Arapahoe County.

THE chief justice did not participate in the decision of this cause.

Mr. S. E. BROWNE, for plaintiff in error.

Mr. ALFRED SAYRE and Mr. JOHN F. BOSTWICK, for defendant in error.

GORSLINE, J. There are various errors assigned by the counsel for the plaintiff in error, but they all, except the last, are to instructions given by the court to the jury, or for refusal to instruct as requested. The last error assigned is for overruling the motion for a new trial. As these different causes, assigned as errors, have not been properly

presented by a bill of exceptions, signed and sealed by the judge before whom the cause was tried, they become no part of the record, and cannot be considered in this court. In *Thompson* v. *Riggs*, 5 Wall. 663, which is a case very similar to this, the whole doctrine in regard to bills of exceptions is very clearly and forcibly stated. As it is presumed, *prima facie*, that the judgment is correct, it must be affirmed.

Affirmed.

LANGLEY et al. *v.* GRILL et al.

1 71
16 449

RECORD *of verdict of jury.* A copy of the verdict of a jury, inserted in the transcript of the record, will not be received to contradict the record of the verdict given in the proceedings of the court.

SHERIFF'S RETURN. A return to a summons "I have duly served the within by reading the same to the within-named John C. Bruce and John H. Langley not found in my county, as I am therein commanded," is ambiguous, and should not be received.

CONSTRUCTION *of the word "defendants."* The word "defendants," used in the record of a judgment in a cause where there are two defendants, will be regarded as referring to both of them, although one of them has not been served with process.

JUDGMENT *against party not served.* It is error to enter judgment against a party not served with process.

JUDGMENT—*partial reversal.* A judgment will not be reversed in part and affirmed in part.

Error to District Court, Gilpin County.

Messrs. REMINE & HULETT, for plaintiffs in error.

Mr. L. C. ROCKWELL, for defendants in error.

HALLETT, C. J. This was an action of covenant, commenced by the defendants in error against the plaintiffs in error, in the district court of Gilpin county.

The sheriff's return upon the summons is as follows:

"I have duly served the within by reading the same to the within-named John C. Bruce and John H. Langley not found in my county, as I am therein commanded."

At the July term, 1866, of the district court, Bruce was defaulted, and, upon a subsequent day of the term, the damages were assessed by a jury and judgment entered against the *defendants*, without naming either of them, and the word "defendants" being in the plural number.

The first of the errors assigned questions the regularity of the verdict, alleging that it was given in another cause. The verdict set forth in the proceedings of the court, which we must regard as the true verdict, appears to have been given in the cause, and this is sufficient. The clerk has inserted in the transcript what he calls a full copy of the verdict, to which, evidently, the objection of the plaintiff in error is directed. This copy is in no way authenticated. The record gives the verdict and we cannot receive the copy for the purpose of contradicting the record.

It is also assigned for error that the court below had not jurisdiction of the person of Langley. There was no appearance by the defendants in that court, and we must therefore look at the return upon the summons to determine this question. It is difficult to ascertain from this return whether the sheriff served the summons upon both Langley and Bruce or upon either one of them. It is first stated that service was made upon both defendants, and to this are added the words "not found in my county," which seem to contradict what is before stated. An officer, to whom process is directed, is required to state clearly and explicitly the time and manner of executing it, and a return such as this, which leaves the mind in doubt as to what has been done by the officer, should not be received. Assuming, however, as the parties in this cause have assumed in argument, that this return shows service upon Bruce and that Langley was not found, is the judgment of the district court erroneous? It is said that this is to be regarded as a judgment against Bruce alone, but we are unable to assent to this proposition.

The judgment stands against the *defendants*, and we know of no rule of construction which will allow us to say that the word "defendants" includes but one. This judg-

ment certainly stands against both of the defendants, and a judgment against two, when one only is served with process, is erroneous. *Swift et al.* v. *Green et al.*, 20 Ill. 173. The weight of authority is against the doctrine laid down in some of the cases cited by defendants in error, that a judgment may be reversed in part and affirmed in part. *Arnold et al.* v. *Sanford*, 14 Johns. 417.

The judgment of the district court is reversed, and the cause is remanded.

Reversed.

CHENEY *v.* BARBER.

1 73
13 264

EVIDENCE — CONTRACT *must be proved as laid.* Where money was to be paid upon the sale of certain mining property, the plaintiff must show that the property has been sold before he can recover.

Appeal from District Court, Gilpin County.

THE action was assumpsit upon the following instrument:

"$600.

Four months after date, for value received, we jointly and severally promise to pay J. E. Barber, or order, six hundred dollars.

October 3d, 1863. WILLIAM S. ROCKWELL.
HAZEN CHENEY, Su'ty."

"In consideration of the above sum, being without interest, we promise and agree that should William S. Rockwell, one of the signers hereto, effect a sale, at the east or elsewhere, of certain mining property on the Bobtail lode, and receive his pay therefor, that we will pay an additional six hundred dollars.

October 3d, 1863. WILLIAM S. ROCKWELL.
HAZEN CHENEY, Su'ty."

In the first count of the declaration, it was alleged that the property referred to in the second part of the agreement was sixty-six and two-thirds feet off the east end of claim No. 1, and twenty feet off the west end of claim No. 2, east of Discovery claim on the Bobtail lode, and that Rockwell had made sale of the property and received pay therefor.

In the second count it was alleged that the property referred to in the second part of the agreement was sixty-six and two-thirds feet off the east end of claim No. 1, east of Discovery claim on said Bobtail lode, and that Rockwell had sold it and received pay therefor. There was judgment for the plaintiff below against Cheney, who alone had been served with process.

Messrs. W. S. and L. C. ROCKWELL, for appellant.

Messrs. JOHNSON & TELLER, for appellee.

HALLETT, C. J. The appellee declared for two sums of $600 each, one of which was payable if Rockwell should sell certain premises on the Bobtail lode, which are described in the declaration. There is no evidence that these premises were sold. One witness swears that Rockwell had property on the Bobtail lode to sell for several parties, and another testifies to an admission by appellant that some property on the Bobtail lode had been sold, but it does not appear that the premises described in the declaration were sold. The contract should have been proved as laid. The judgment of the district court is reversed, with costs, and the cause remanded for a new trial.

Reversed.

KINNEAR, Adm'r of STROPE, v. TUCKER et al.

BILL OF EXCEPTIONS — *defective.* If evidence, offered by a defendant to disprove the plaintiff's case, is excluded by the court, the bill of exceptions should contain the evidence given on behalf of the plaintiff, in order that this court may determine the relevancy of the evidence so excluded.

PRESUMPTION *in favor of judgment.* It must be shown affirmatively that the district court erred; this court will not presume it.

Error to District Court, Jefferson County.

DEFENDANTS in error sued Strope in the district court of Jefferson county, and declared specially upon a failure to

return certain cattle, and added the common counts. Upon the trial below, Strope offered in evidence certain orders and receipts for cattle, signed by one or both of the defendants in error. The evidence given on behalf of defendants in error in the court below was not embodied in the bill of exceptions.

Mr. L. B. FRANCE, for plaintiff in error.

Messrs. J. BRIGHT SMITH and GEORGE F. CROCKER, for defendants in error.

HALLETT, C. J. We are asked to reverse this judgment because the district court improperly excluded from the jury certain evidence offered by the defendant in that court. There is nothing in the bill of exceptions, except the evidence, which was offered and rejected.

As all the evidence given upon the trial below is not before us, we are unable to say whether the evidence contained in the bill of exceptions was properly excluded. It must be shown affirmatively that the court below erred; we cannot presume it. *Ballance* v. *Leonard*, 37 Ill. 43.

The judgment of the district court is affirmed, with costs.

Affirmed.

ANTHONY *v.* ESTABROOK.

AGENT — *what declarations will bind principal.* Declarations of an agent are not admissible in evidence against his principal if made after the transaction to which they refer.

Where a horse was hired to go a journey and died on the way, declarations of the driver, who was the agent of the hirer, made after the death of the horse and after the driver had returned from the journey, are not admissible to charge the hirer.

Appeal from District Court, Arapahoe County.

ACTION on the case to recover the value of a horse.

There was evidence to the effect that appellee kept a livery stable in Denver, and that appellant hired a team from him

to be driven to Box Elder, a distance of nineteen miles from Denver, and return. That appellant put William T. Shortridge in charge of the team, who drove it to Living Springs, which was much farther from Denver than Box Elder.

Alexander Davidson, a witness introduced by appellee, testified to declaration made by Shortridge as follows: "He said they were a good team and that he lost one of the horses; that he died on the road side; he said he died this side of Living Springs, as he was returning from Living Springs.

Shortridge made this statement to me, I think, the second day after he went out with the team. It was after he got back. I do not know it was the same day he got back."

On cross-examination the witness stated: "Shortridge told me something about the horse taking sick and bloating up. He said he took all the care of the horse he could."

Duncan Merritt, a witness on behalf of appellee, testified: "I heard conversation between Mr. Shortridge, on his return, and plaintiff. Estabrook asked Shortridge how came the horse to die, and he told him Anthony told him it was a good team and to put them through, and Shortridge said he was drinking and it did not make any difference with him, that Anthony was responsible. Shortridge said he drove that evening to Living Springs. He said he left the horse on the side of the road dead as he started back."

The verdict was for the plaintiff below.

Mr. J. BRIGHT SMITH and Mr. GEORGE F. CROCKER, for appellant.

Messrs. CHARLES & ELBERT, for appellee.

HALLETT, C. J. It is clear that the declarations of an agent, if introduced for the purpose of binding his principal, must have been made at the time of the transaction to which they relate, and not afterward. *Fairlee* v. *Hastings*, 10 Vesey, 123; *Corbin* v. *Adams*, 6 Cush. 93; *Luby* v. *Hudson River R. R. Co.*, 17 N. Y. 131.

It appears that Shortridge was employed to go a journey

for appellant, for which purpose a team was hired by the latter from appellee. After an absence of two days, Shortridge returned with but one of the horses which he had taken away, saying that the missing horse had died on the road, and giving some incidents of the trip. Evidence of these declarations of Shortridge was admitted in the court below for the purpose of charging appellant, and, we think, improperly admitted. The horse died during the journey of Shortridge, and these declarations were not made until after his return, and therefore they were not contemporaneous with the loss of the horse to which they referred. With the death of the horse the liability of the appellant, if any exists, became fixed, and he is not to be charged upon any statements made by Shortridge after that event took place. The rule governing this question, and the principles upon which it rests, are so fully declared in the cases above cited that any discussion of it here would be out of place.

It is objected that the evidence does not support the declaration, inasmuch as it shows a hiring of two horses and a buggy, whereas the declaration speaks of the hiring of one horse only. It is to be observed that the third count of the declaration contains no mention of any hiring whatever, but in that count it is simply alleged that the defendant had the care of a certain other horse, etc. For aught that appears, the evidence was given under the third count, to which we perceive no objection. For the reason first stated, however, the judgment must be reversed, with costs, and the cause will be remanded.

Reversed.

PATON v. THE PEOPLE.

1 77
4 47
1 77
14 243
1 77
82 232

STATUTE INOPERATIVE. The thirteenth section of the act of 1861 (1 Sess. 71), concerning licenses, was never effectual for any purpose.

LICENSE, *general law not affected by charter of Black Hawk.* The act incorporating the city of Black Hawk, and conferring power upon the authorities

of that city to license the sale of spirituous liquors (3 Sess. 228), does not affect the act of 1861 (1 Sess. 69) as amended, which confers like power upon the board of county commissioners.

LICENSE *issued by city no defense to prosecution under general law.* In an indictment, under the act of 1861 concerning licenses, for selling spirituous liquors without license within the limits of the city of Black Hawk, a license issued under the charter and ordinances of that city cannot be shown in defense.

Appeal from District Court, Gilpin County.

THE act of 1861, section 8 (1 Sess. 70), provides that the board of county commissioners may grant licenses to keep saloons, hotels, public houses or groceries upon conditions named, and section 12 defines a grocery to be a place where spirituous or vinous liquors are retailed by less quantities than one quart. Section 2 of the act of 1862 (2 Sess. 78) provides a penalty for carrying on the business named without such license. The act incorporating the city of Black Hawk (3 Sess. 233) contained, among other powers conferred on the city council, the following:

"SECTION 45. To license, restrain, regulate, prohibit and suppress tippling houses, gambling houses, bawdy houses and other disorderly houses, and the selling and giving away of any intoxicating or malt liquors by any person within the city, except by any person duly licensed."

The thirteenth section of the act of 1861 (1 Sess. 71) was repealed by the act of 1866 (5 Sess. 66), and is as follows:

"SECTION 13. The president and trustees of incorporated towns shall have the exclusive privilege of granting licenses to saloons or groceries within their incorporated limits, and all sums of money which may be received for licenses granted as aforesaid, shall be paid into the county treasury."

Mr. L. C. ROCKWELL and Mr. E. T. WELLS, for appellant.

Mr. HUGH BUTLER, for the people.

Mr. Justice GORSLINE dissented.

HALLETT, C. J. Appellant was indicted in the district court of Gilpin county for selling spirituous liquors in quantities of less than one quart without license, in violation of the act of 1861 concerning licenses, as amended by the acts of 1862 and 1866. It appears that the selling occurred in the city of Black Hawk, and, upon the trial in the court below, the matters charged in the indictment being admitted, the appellant sought to defend by showing that he held license to vend spirituous liquors, issued by the corporate authorities of that city. This evidence was rejected, and the ruling of the court is assigned for error.

We agree with the counsel for both parties, that the thirteenth section of the act of 1861 was never effectual for any purpose in this territory. Incorporated towns, having presidents and trustees, were never known to our laws, and that section was always insignificant. A license is defined to be a right given by some competent authority to do an act, which, without such authority, would be illegal, and to license one to do an act is simply to remove the legal restraint operating upon him respecting that act. By the act of 1861, the citizens of Gilpin county were placed under legal restraint in the matter of selling intoxicating liquors from which they could relieve themselves by obtaining license to sell from the board of commissioners of that county. This inhibition rested upon the citizens of Black Hawk equally with other citizens of the county. By the act of 1864, incorporating the city of Black Hawk, the corporate authorities of that city were invested with power to license, restrain, regulate, prohibit and suppress the selling and giving away of intoxicating and malt liquors within the city. The city authorities were not required to execute this power in any particular manner, or at all. They could suppress the sale of intoxicating drinks, or impose hard terms, or ignore the subject and leave the traffic open to all. The corporation was invested with discretionary power over the subject, and we are told that this is not consistent with the provisions of the act of 1861. We cannot adopt this view. It is difficult to believe that the legislative assembly, by

conferring upon the city of Black Hawk power which might or might not be exerted by that city, intended to revoke the positive provisions of the act of 1861. If the act incorporating the city of Black Hawk displaced the act of 1861 as to that city, and the corporation should decline to exert its power, then the vending of intoxicating liquors would be open to all the turbulent and lawless not less than the order-loving, well-intentioned citizen. Again, the power to license is not declared to be exclusively vested in the city, and no reason is perceived why the restraint operating upon the citizen may not be removable in the discretion of two distinct bodies. If one can be restrained from selling intoxicating liquors until he shall obtain permission from the corporation of Black Hawk, he certainly may be additionally required to obtain permission from the county commissioners of Gilpin county. In another, and, perhaps, a broader view of this subject, we observe that the power to license the vending of merchandise is exercised mainly for the purpose of raising revenue. It is true that the granting of liquor licenses is made discretionary, doubtless with a view to enable the authorities to keep the traffic from bad hands, but, nevertheless, the payment of money is only required for revenue purposes. The granting license upon payment of a sum of money is one method of collecting taxes. License Tax Cases, 5 Wal. (U. S.) 463.

The act of 1861 enabled the county of Gilpin to collect certain revenue by licensing the sale of intoxicating drinks. By and by, in 1864, a new corporation was created within the county of Gilpin and called Black Hawk, to the existence of which revenue was necessary, and here again the power to license was conferred. The needs of the county of Gilpin were not diminished by erecting the city of Black Hawk, and we do not discover that the legislature intended to deprive the county of any of its revenue. The cases of *Sloan* v. *The State*, 8 Blackf. 361, and *Harrison* v. *The State*, 9 Mis. 526, support these views. The case of *Woodward* v. *Turnbull*, 3 Scam. 1, is in conflict with those last named, but *Gardner* v. *The People*, 20 Ill. 430, is distinguishable

from the case under consideration. In that case, the city of Monmouth had not exercised the licensing power, and it was decided that the accused was amenable to the general law.

The court say, that the act incorporating the city of Monmouth gives the city the exclusive right to license the sale of spirituous liquors. Now, if the city had exclusive power to license the sale of spirituous liquors within the city, how could the county have any authority in the premises? If the city alone had power to license, it seems to us that the county could not, nor could any other body take cognizance of the subject. Yet the court thought that the accused was amenable to the general law. Again, the court say that if the city authorities should grant license, the holder would be protected from the penalty of the general law. But why? If the general law was operative within the city of Monmouth, would its operation be suspended by the action of the city authorities giving license pursuant to the charter and ordinances? It seems to us that the act of the city authorities could in no way affect the operation of the general law, and that law, if enforcable at all within the city, should be enforced without regard to the action of the city authorities. But we agree with that court that the general law was not repealed by the city charter, and the judgment was reversed upon another ground.

The judgment of the district court is affirmed, with costs.

Affirmed.

ORMAN et al. v. KEITH et al.

APPEAL — *not based upon bill of exceptions.* An appeal may be prosecuted without bill of exceptions; imperfections in the latter cannot be alleged in support of a motion to dismiss.

APPEAL BOND — *approval in vacation.* An appeal bond cannot be approved in vacation without an order of court, and the approval of the clerk of the district court, given in vacation without such order, is inoperative.

APPEAL BOND — *approval not amendable.* The omission to procure the bond to be approved according to law cannot be supplied by amendment.

Appeal from District Court, Arapahoe County.

UPON motion to dismiss the appeal,

Mr. L. B. FRANCE, in support of the motion.

Mr. S. E. BROWNE, *contra.*

Per CURIAM. Appellees move to dismiss this appeal because of alleged imperfections in the bill of exceptions, and because the appeal bond was approved by the clerk of the court below in vacation, there being no order of that court authorizing such approval. Inasmuch as appellants were entitled to prosecute an appeal from the judgment of the district court, whether there was any exception to any of the proceedings in that court or not, we cannot, upon this motion, consider the first objection.

As to the appeal bond, we think that there should be an order of the district court directing the clerk to approve the bond. The statute (3 Sess. 116) declares that the clerk may approve the bond, provided the order allowing the appeal shall so direct. In this case, the order allowing the appeal contains no such direction, and the act of the clerk approving the bond, in the absence of such provision, is inoperative. Nor can appellants be allowed to file a new bond in this court under that provision of the statute which authorizes defective appeal bonds to be amended in the discretion of the court. This appeal bond is not defective, but appellants failed to obtain the approval of the bond by the district court as the law directs, and for this reason the appeal must be dismissed, with costs.

Appeal dismissed.

1	82
3	113
1	82
23	497

ORMAN et al. *v.* KEITH et al.

PRACTICE — *when to file bill of exceptions.* A bill of exceptions, filed in vacation, there being no order of court to authorize it, is no part of the record.

Mr. S. E. BROWNE, for Orman and Jewett, presented a transcript of the record and moved that the writ of error be made a supersedeas. The errors assigned referred to the evidence given at the trial below, and this evidence was contained in a bill of exceptions filed in vacation. There was no order of court authorizing the bill to be filed in vacation pursuant to the statute. 4 Sess. 92.

PER CURIAM. We think that a bill of exceptions should be filed in term time unless there is an order of court allowing it to be filed in vacation. In this case there was no such order and no bill of exceptions filed in term time, and therefore we cannot notice the errors assigned. The motion for supersedeas is denied.

Motion denied.

POLLOCK et al. *v.* THE PEOPLE.

1 88
15 248

APPEAL — *in quo warranto proceeding.* Under the act of 1861 concerning proceedings in cases of *quo warranto* (1 Sess. 351), an appeal lies in all cases from the judgment of the district court to this court, upon such terms as the district court shall prescribe.

The district court may, in its discretion, allow an appeal without prescribing terms.

But if terms are prescribed, they must be such as relate to the subject-matter of the controversy.

APPEAL BOND *without conditions.* To require a bond to be given, without prescribing conditions to the bond, is ineffectual, and the case is to be regarded as an appeal allowed without terms.

In such case failure to execute a bond, as required by the order of the district court, cannot be alleged as ground for dismissing the appeal.

Appeal from District Court, Arapahoe County.

UPON motion to dismiss the appeals.

This was an information, in the nature of a *quo warranto*, against appellants for having usurped and intruded into the corporate offices of the city of Central. Separate appeals were prayed by the defendants below, and the appeals were allowed upon the defendants giving bonds in

sums that were specified, but nothing was prescribed as to the conditions of such bonds.

Mr. WILLARD TELLER, in support of the motion.

Mr. E. WAKELEY and Mr. C. C. POST, *contra.*

HALLETT, C. J. The appellees move to dismiss this appeal because it was irregularly taken, not being allowed by law, and, if properly allowed, that appellants have not taken the necessary steps to perfect it. As to both points, it will be necessary to consider the first clause of the fifth section of the act concerning proceedings in cases of *quo warranto* (Stat. 1861, p. 352) which reads as follows:

"Appeals may be taken from the decision of the district court upon such terms as the said district court shall prescribe."

It is said, that if this clause be read in connection with the forty-first section of the Practice Act (Stat. 1861, p. 285) which provides for appeals where the judgment appealed from amounts to $20, exclusive of costs, or relates to a franchise or freehold, it will be seen that no appeal can be taken from the judgment of the district court respecting the title to an office in a case arising under the act from which the clause is taken, but such appeal can be taken only when the right to a franchise is involved.

Whether these sections ought or ought not to be construed together as acts *in pari materia*, seems to us not material, for, if we so construe them, we fail to deduce from them the conclusion that the clause of section 5, before recited, is restricted to cases respecting the right to a franchise. By section 41 of the practice act, an appeal is given from the judgment of the district court when the same relates to a franchise, and, therefore, there was an appeal in such cases, before the enactment of the act, concerning proceedings in cases of *quo warranto;* and if the clause, before recited, of section 5 of that act had never been incorporated therein, an appeal might, nevertheless, have been prosecuted from such judgments under the pro-

visions of section 41 of the practice act. We are not at liberty to say that the clause of section 5, which we have given above, serves no purpose; that those are idle words adopted by the legislative assembly without any intention to alter or modify the law as it stood at the time of that enactment. It is presumable that the legislative assembly intended to enlarge the remedy by giving an appeal where none was given before.

Furthermore, this act concerning proceedings in cases of *quo warranto* relates to a special remedy applicable to certain classes of cases, and without any words of limitation, the legislative assembly have said that appeals may be taken from decisions of the district court under the act. The language of the clause giving the appeal is general, and we cannot apply it to one class of cases mentioned in the act and exclude another class of those cases from its operation. This construction appears to have been adopted without objection in the State of Illinois from whence we obtained this statute. It is the practice in that State to prosecute appeals in cases of this kind. *Dickson* v. *The People*, 17 Ill. 191; *The People* v. *Ridgley et al.*, 21 id. 65; *Donnelly* v. *The People*, 11 id. 552.

As to the steps taken by the appellants to bring this cause into this court, we doubt whether we can consider any irregularity relating thereto. We have seen that the district court was empowered to prescribe the terms upon which the appeal should be taken. Undoubtedly the district court had the power to allow the appeal without the giving of a bond, the payment of costs, or the doing any other act by the appellants usually done in cases of this kind. The district court was authorized to prescribe the terms upon which the appeal should be taken, in other words, to declare whether any and what acts should be performed by the appellants before they should be permitted to bring the record into this court. It cannot be doubted that the terms thus to be prescribed are for the protection of the party who obtains the judgment from which the appeal is prosecuted. The district court cannot prescribe

the doing of some act altogether disconnected from the suit as the condition upon which the appeal shall be allowed, but the terms given must relate to the subject-matter of the controversy. Now, in this case, the appellants prayed an appeal which was allowed upon the giving of bonds by the appellants, but nothing was prescribed by the district court as to the conditions of the bonds so to be given. The appellants were not required to prosecute their appeal effectually and without delay, to pay costs, to abide the judgment of the district court or of this court, or to do any other act before coming into this court. The district court required nothing of them except that they give bonds in certain sums.

Now the giving of bonds without conditions, or with conditions not prescribed by the court, was an ineffectual proceeding, and it is not material whether the appellants did or did not comply with the order of the court. The district court had no power to order the appellants to give bonds subject to no conditions, for, if such bonds would be valid, the appellants could relieve themselves of their obligation only by paying the entire penalties to the people. This cause stands as upon an appeal allowed by the district court without prescribing terms, and, as the act of that court, in allowing the appeal with or without terms, was discretionary, we cannot revise its action.

The motions to dismiss are denied.

Motions denied.

---

1 86
6 40

1 86
31 475

FREAS v. TOWNSEND.

PRACTICE — APPEAL — *when prayed for.* An appeal from a district court to this court must be prayed for within three days after judgment is rendered.

Appeal from District Court, Gilpin County.

UPON motion to dismiss the appeal.

Mr. L. C. ROCKWELL, for appellant.

Messrs. JOHNSON & TELLER, for appellee.

Per CURIAM. This is an appeal from the judgment of the district court of Gilpin county, and is now before this court on a motion to quash the appeal, for the reason that the appeal was not prayed for in the court below in the time prescribed by the statute.

The appellee in this court, who was the plaintiff below, brought an action of assumpsit in the district court of Gilpin county against Lorenzo M. Freas. By agreement or stipulation the cause was tried by the court below without a jury; and the court, after hearing the evidence, rendered a judgment against the defendant, and in favor of the plaintiff. This judgment was rendered and entered of record on the 10th day of August, A. D. 1867, and on the same day the defendant, by his counsel, moved for a new trial and filed his reasons therefor. On the 17th day of August, A. D. 1867, this motion was argued and overruled by the court. The appellant then prayed for an appeal which was allowed by the court and the cause on that appeal was brought into this court. The appellee now moves the court to quash the appeal for the reason that it was not prayed for within the time prescribed by law.

The forty-first section of the act of the legislature, passed 1861 (Laws of 1861, page 285), allowing appeals, provides that the appeal be prayed for within three days after the time of rendering the judgment or decree. It is true that on the 10th 'of August, A. D. 1867, the day the judgment was entered, there was a motion for a new trial, but we think the defendant should at the same time, or within the three days from that time, have prayed for his appeal. There was nothing inconsistent in the two motions. This he did not do. He did not pray for the appeal until after the time allowed by law for such prayer: and the motion is sustained. The appeal is dismissed.

Dismissed.

SEARS v. ANDREWS et al.

1 88
10a 312
1 88
15a 477

VERDICT IN REPLEVIN—*sufficiency*. If the jury find the issues for the plaintiffs, and assess their damages at $10, probably the verdict would not answer all issues in an action of replevin; but it is sufficient to determine some issues in that action, as, for instance, an issue joined upon plea of property in defendant or a stranger.

PRESUMPTION *in support of proceedings of district court—verdict*. Where there are no written pleadings, and the record does not disclose the issue tried, the verdict being sufficient as to some issues which may arise in that form of action, the court will presume that it is responsive to the issue which was tried.

Appeal from District Court, Gilpin County.

REPLEVIN by appellees against appellant before a justice of peace, and appeal to the district court. In the latter court, the jury returned the following: "We the jury in the above-entitled cause find for plaintiff and assess the damages at $10 (ten dollars)."

The court rendered judgment upon this verdict in favor of the plaintiffs below, for possession of the property, and for the damages and costs.

Mr. L. C. ROCKWELL, for appellant.

Messrs. POST & MORGAN, for appellees.

HALLETT, C. J. The only question presented for our consideration in this case is the sufficiency of the verdict of the jury to sustain the judgment of the district court. The action was brought before a justice of the peace and removed into the district court by appeal. There are no written pleadings or other evidence of the issue tried in the record, and therefore we are unable to ascertain what that issue was. Probably this verdict would not answer all the issues which may arise in an action of replevin, but it seems to us to be responsive to some issues which may arise in that action. For instance, if the issue was upon a plea of property in the defendant or in a stranger, this verdict, though informal, is sufficient to show that the issue was

found for the plaintiffs below and that damages for detaining the property were assessed at $10. "If a verdict can be concluded out of the findings to the point in issue, the court shall work and mould it into form according to the real justice of the case." *Hawks* v. *Crofton*, 2 Burr, 698. As the issue tried in the court below is not given, we are to presume that it was determined by this verdict, for all presumptions are in favor of the regularity of the proceedings. *Hunt* v. *Bennett*, 4 Greene (Iowa), 512, cited by appellant's counsel, is not in point, whatever may be said of it in the digests. It is not difficult to find cases in which verdicts less formal than this have been sustained. *Jarrard* v. *Harper*, 42 Ill. 457.

The judgment of the district court is affirmed, with costs.

Affirmed.

SOPRIS v. TRUAX.

1 80
12 536
1 80
19 283

REPLEVIN — *wrongful taking — demand and refusal.* In replevin it is necessary to show a wrongful taking or detention of the property in controversy, and it is erroneous to instruct the jury that the only matter in dispute is the ownership of the property.

PLEADING IN REPLEVIN — *fraud.* The rule which requires that fraud be specially pleaded does not apply to the action of replevin.

INSTRUCTIONS — *as to facts.* Instructions to the jury should be confined to the law of the case, leaving the facts to be determined by the jury.

PRACTICE — *motion to restore competency of witness.* A motion for leave to file a new bond, in order to obtain the testimony of a surety in the original bond, should be based upon affidavit showing the materiality of the testimony which is to be obtained.

Error to Probate Court, Arapahoe County.

THE instructions given at the trial, which are referred to in the opinion of the court, are as follows:

"1st. That the only matter in dispute in this case is the ownership of the property in question.

2d. That fraud can never be presumed; that fraud must not only be alleged in the pleadings in specific terms, but it

must be proved, and the jury are instructed that there is no allegation of fraud in any of the pleadings that make up the issue to be tried in this case.

5th. That evidence, tending to show that James W. Truax was occasionally in possession of some of the property in dispute, or had used the same at different times, is not sufficient proof of ownership in him, particularly when there is evidence uncontradicted that the property belonged to the plaintiff."

The third instruction asked by the plaintiff in error, and refused by the court, is as follows:

"That unless the jury find from the evidence that the plaintiff demanded the property from the defendant, mentioned in the second count of the declaration, they must find for the defendant on said second count."

Mr. ALFRED SAYRE, for plaintiff in error.

Mr. L. B. FRANCE, for defendant in error.

HALLETT, C. J. This was an action of replevin, the first count in the declaration being for taking, and the second count for detaining, the property in controversy. Upon the trial in the court below, there was no evidence whatever to show a taking of the property as alleged in the first count, or a detention as alleged in the second count. The evidence was directed to the question of the ownership of the property, and if it should be conceded that the plaintiff below established her title, she was, nevertheless, bound to demand the possession of the property before she commenced suit. *Ingalls* v. *Bulkley*, 13 Ill. 315.

The third instruction asked by the plaintiff in error and refused by the court should have been given, and the first instruction given for defendant in error should have been refused. The ownership of the property was not the only matter in dispute upon the trial of the cause. We are at a loss to determine what question of fraud arose upon the trial in the court below, to which the second instruction, given on behalf of the defendant in error, could be applied.

But, if there was such question, it was not correct to say that the pleadings must disclose it. The rule which requires fraud to be specially pleaded does not apply to the action of replevin. The instruction was calculated to mislead thy jury and should not have been given.

By the fifth instruction for the plaintiff below, the jury were plainly told that certain evidence was not sufficient to establish a disputed fact, and this was followed by a declaration that the evidence introduced by the plaintiff below, upon the same point, was uncontradicted. It is generally known among members of the legal profession at this day, that the jury are the judges of the weight and sufficiency of testimony, and that the court must allow them to determine the facts in all cases. Nevertheless, we will direct attention to the twenty-eighth (28) section of our practice act, by which courts are confined to the law of the case when instructing juries, and to one authority upon this point. *Bond et al.* v. *The People*, 39 Ill. 26.

The defendant below desired to call one of his sureties upon the replevin bond as a witness in the cause, and moved the court for leave to file a new bond with a view to relieve the surety of incompetency because of his liability on the bond. This motion was not supported by affidavit, and therefore the court was not advised as to the materiality of the testimony of the surety, and error cannot be assigned upon the denial of the motion. We do not think it necessary to examine the testimony upon the trial in the court below and the objections thereto, as the judgment must be reversed for error in giving and refusing instructions.

The judgment of the probate court is reversed, with costs, and the case is remanded for a new trial.

Reversed.

WORRALL v. HARE.

ABATEMENT *plea in attachment cases.* The plea traversing the facts set forth in an affidavit for attachment is a plea in abatement.

JUDGMENT *upon such plea.* Under the act of 1861 (1 Sess. 204) as amended by the act of 1864 (3 Sess. 43), if issue of fact joined upon such plea be found for the plaintiff, the judgment is *quod recuperet.*

Error to District Court, Gilpin County.

Mr. L. C. ROCKWELL, for plaintiff in error.

Messrs. ROYLE & BUTLER and Mr. I. N. WILCOXEN, for defendant in error.

HALLETT, C. J. This was an attachment suit brought by the defendant in error against the plaintiff in error to recover money due on a promissory note. The plaintiff in error traversed the facts set out in the affidavit upon which the attachment was issued, and upon the issue thus formed a trial was had, which resulted in a verdict for the defendant in error. The jury called to try this issue assessed damages against the plaintiff in error, and the court rendered judgment against him for the amount thereof. Some of the questions raised by the assignment of errors cannot be noticed, for the reason, that no bill of exceptions was taken upon the trial of the cause. It is claimed, however, that upon the trial of the issue joined upon the plea traversing the allegations of the affidavit, the jury improperly assessed damages against the plaintiff in error, and that the district court erred in entering final judgment upon the verdict, and this objection we will consider. The question is to be determined by the character of the plea, upon which issue was joined.

If it is a plea in abatement there was no error in rendering judgment *quod recuperet* upon the verdict of the jury for the plaintiff below. *Myers et al.* v. *Hunter et al.*, 20 Ohio, 381.

The act upon which this suit is founded gave to defendants the right to traverse the allegations contained in the attachment affidavit, in the following words:

"That in case any plea in abatement traversing the facts in the affidavit shall be filed, and a trial shall be thereon had, if the issue shall be found for the defendant, the attachment shall be quashed

and the property attached shall be released from such attachment and restored to the possession of the defendant, and the garnishees, if any, shall be discharged, but the writ of attachment in cases commenced by attachment, shall, nevertheless, stand as a summons and the cause shall proceed to trial and judgment, as if originally commenced by summons." 1 Sess. Laws, p. 204; 3 id. p. 43.

In another clause of the act, the officer, to whom the writ was directed, was required to serve the writ upon the defendant therein, and it has always been held here and elsewhere, so far as we are informed, that by such service, when made, the defendant was notified of the pendency of the suit, and the court obtained jurisdiction of his person. The writ of attachment, when served upon the defendant and levied upon his property, performed the office of a summons in bringing the defendant into court, and also the especial function of a writ of attachment in securing property for satisfying any judgment that might be obtained in the cause. By the terms of the clause above recited, the effect of the plea traversing the allegations in the affidavit, if sustained upon trial, was to abate the operation of the writ, so far as the property of the defendant and garnishees were affected by it, but it did not affect the writ in its office as a summons.

Whenever the plea was found to be true, the writ was diminished of its authority touching the property of the defendant, but, nevertheless, it was to stand as a summons, and the cause was to proceed to trial and judgment as if commenced by summons. The object and effect of the plea then was to lessen the operation of the writ, in part to abate it, and therefore we think the plea is properly called in the act, a plea in abatement.

In the clause before recited, all after the word "quashed" was added by the amendment of 1864. Of course before that amendment, when the verdict was for the defendant, the writ was quashed and the suit was at an end. As it stood prior to that amendment, the statute was the same upon this point as that of Illinois, and it was held, by the supreme court of that State, that the plea traversing the affidavit was

a plea in abatement, and that upon the issue joined thereon the successful plaintiff was entitled to judgment *quod recuperet*. *Boggs* v. *Bindskoff et al.*, 23 Ill. 67.

The amendment of 1864 diminished the power of the plea but did not change its character. It belonged to the class known as pleas in abatement prior to that amendment, and it remained in that class notwithstanding the amendment. The case of *Leitensdorfer et al.* v. *Webb*, 20 How. 176, is not an authority against the position here assumed. In that case, the statute upon which the proceeding was founded declares that, if the issue upon any material fact in the affidavit be found for the plaintiff, "the cause shall proceed." Now, if upon verdict for the plaintiff, judgment *quod recuperet* should be entered, the cause would be at an end. and could not, therefore, proceed as the statute requires. Under that statute, the judgment in favor of the plaintiff could only be *respondeat ouster*, because, if *final* judgment should be entered, the cause would not then proceed as the statute requires. Our statute is materially different. It contains no provision as to the course to be pursued when the issue upon the verity of the affidavit is found for the plaintiff, and therefore we are left to the common-law rule which subjects a defendant, who fails to maintain his plea in abatement, to a peremptory judgment, without giving him further opportunity to contest the plaintiff's right of action. Nor does it appear that the question now under consideration was before the court in that case. After the trial of the issue arising upon the affidavit in that case, the defendant, without objection, as it seems, from the plaintiff, pleaded in bar to the action, and a new issue was framed upon which a trial was had. The supreme court held, that the proceedings upon this latter trial only were before them for consideration, and in them no error was found.

Since the trial of this cause in the district court, the practice in cases of this kind has been regulated by statute, and therefore this case cannot become a precedent.

The judgment of the district court is affirmed, with costs.

Affirmed.

CLAYTON v. SMITH.

1 95
5 165
1 95
7a 463

PRACTICE—*error may be assigned on agreed case.* In a case heard on an agreed statement of facts, it is not necessary to move for a new trial in the court below:

Or to preserve the statement of facts in the record by bill of exceptions:

Or to except to the judgment of the court below:

CONSTRUCTION *of revenue law of* 1864. As to contracts made after the law of June 30, 1864 (13 Stat. at Large) was passed, the law will presume that the two and one-half per centum, mentioned in section 103 of that act, is included in the rate specified in the contract, and a carrier of goods for hire cannot recover the tax in addition to the contract price.

Error to District Court, Arapahoe County.

Mr. J. BRIGHT SMITH and Mr. GEORGE F. CROCKER, for plaintiff in error.

Messrs. CHARLES & ELBERT, for defendant in error.

HALLETT, C. J. This was an agreed case, in which the defendant in error, who was also defendant in the court below, obtained judgment for costs. The record shows the stipulation or agreement of the parties and the judgment of the court, no bill of exceptions being taken by either party. We shall first notice some questions of practice presented by defendant in error. It is contended that error cannot be assigned upon the record, because,

1st. There was no motion for a new trial made in the court below.

2d. The parties' statement of facts is not preserved in the record by bill of exceptions.

3d. There was no exception to the judgment of the court below.

As to the first point, if the act of the district court is to be regarded as the trial of a cause by the court without a jury, we have heretofore decided that error may be assigned upon the judgment of the court in such cases, without a motion for new trial being made. But, in this case, no issue of fact was tried, such trial being rendered unnecessary

by the agreement of the parties. The facts were not in dispute, but the parties were unable to agree as to the law arising upon the facts, and, therefore, they called upon the district court to assist them. In respect to the functions of the court, called into exercise by these parties, it was like the case of a demurrer to pleading, in which the demurrant admits the facts alleged against him, and demands the judgment of the court upon them, or, like a special verdict, in which the facts are stated, and the finding is for the plaintiff or defendant, according to the law arising upon those facts. We move for a new trial only when issues of fact have been determined, and, as there was no such issue in this case, such motion would have been irregular. As to the second and third points, the practice adopted in this case has been sanctioned by the supreme court of the United States, and we shall not look for other authority.

In the case of *Stimpson* v. *Baltimore & Susquehanna R. R. Co.*, 10 How. 345, the question was, "whether, as this case is not brought up either upon express or specific exceptions to the rulings of the circuit court, nor upon any decision of that court, upon a special verdict found by the jury, but comes before us upon an agreed statement between the parties, this court can, in this form, take cognizance thereof?"

And this was resolved in the affirmative. In *Suydam* v. *Williamson*, 20 How. 429, the practice respecting bills of exception, special verdicts and agreed cases, is elaborately discussed, and the practice pursued in the case at bar is fully approved. There are a great many cases in the reports of the supreme court in which this practice is recognized and approved, of which *Munford* v. *Wardell*, 6 Wal. 425, is the latest; and we regard the practice as settled in all the courts established by the federal government. The practice in this court should conform to the practice in the supreme court of the United States, as far as practicable, inasmuch as our proceedings may be reviewed in that court. The objections raised by defendant in error cannot be sus-

tained, and, therefore, we proceed to examine the judgment of the court below.

By section 103 of an act to provide means for the support of the government, and for other purposes, approved June 30, 1864, congress levied a tax of two and one-half per centum upon the gross receipts of persons and corporations engaged in transporting passengers and property for hire, and added to the section the following: "Provided, that all such persons, companies and corporations shall have the right to add the duty or tax imposed hereby to their rates of fare, whenever their liability thereto may commence, any limitations which may exist by law or by agreement with any person or company, which may have paid, or be liable to pay, such fare, to the contrary notwithstanding."

In December, 1864, defendant in error delivered to plaintiff in error certain freight, at nine cents per pound; afterward he was taxed on receipt of the freight money the sum of $482.67 which tax he paid to the government.

The question is, whether, under the act above mentioned, defendant in error may add the amount of the tax paid by him to the contract price of nine cents per pound.

The doubt arises upon the proper construction of the clause given above; and we think it may be removed by careful consideration of the language of the law. In the first place it is to be observed, that the parties taxed have the right to add the duty or tax to their *rates of fare;* by which we understand that the carriers were authorized to increase their ordinary and customary charges for carrying by so much as would be necessary to meet this tax upon the gross amount received. This is not authority to collect two and one-half per centum upon the amount received in an isolated case, but rather an authority to advance the *rates of fare*, so that the aggregate amount received for all services performed by the parties as carriers shall be two and one-half per centum larger than before the passage of the act. It is to be observed, also, that this right of the carrier to re-imburse the tax paid from the pocket of his employer is to be exercised by adding to *his rates of fare.* He can-

not collect the two and one-half per centum from his employer as a tax, but he may increase his rates of fare, so that the fare shall include the two and one-half per centum. Upon reading further we find that the carriers may add the tax to their rates of fare, "Whenever their liability thereto may commence, any limitations which may exist by law or by agreement," etc.

The tax is upon the gross receipts of the parties, from which it seems that they are not liable to the tax until the money actually comes into their hands. If, however, we say that the act authorizes carriers to add the tax to their rates of fare *when their liability commences*, and that liability does not arise until the fare has been paid, we shall involve ourselves in an irrational attempt to increase the fare after it has been extinguished by payment. In the nature of things the right to increase the fare by the amount of the tax must precede the payment of the fare. We conclude, therefore, that the words "whenever their liability thereto may commence" refer not to the receipt of the money by the carrier, but to some other time. At the time the act was passed, the price to be charged by many carriers for transporting passengers and property was regulated by law, while many others had entered into contracts which were yet unfulfilled. It was to these cases that the clause under consideration was intended to apply. The explanatory language with which the clause concludes is not susceptible of a different construction.

In construing contracts, we consider the law operative at the time of making the contract, upon the presumption that the parties themselves looked to that law as their rule of conduct. When, as in this case, the contract was made after the passage of the law, the presumption is that the parties had knowledge of the law, and availed themselves of its provisions. Now, the first part of the clause we are considering authorizes the carrier to add the tax to his rates of fare, and this must be done, if done at all, before the fare is fixed by the contract. As to contracts made before the enactment, this would not be true, because the carrier,

not having been apprised of the tax at the time of making the contract, had no opportunity to protect himself by increasing his rates.

But, in contracts made subsequently to the enactment, the presumption is, that the carrier has advanced his rates so as to meet the tax. Indeed, he needed not the authority of an act of congress to enable him to increase his rates, except the rates were prescribed by law or limited by contract at the date of the act. After the carrier was informed of the tax, if his rates of fare were to be regulated by himself, he could, without the aid of this law, provide against the duty imposed upon him, and, if human experience is to be trusted, he needed no suggestion upon that point.

Therefore, as to voluntary agreements, it will be seen that the clause we are considering is significant only when applied to agreements existing at the date of the act.

In this case the contract was made in December, 1864, several months after the act of congress took effect. The law presumes that the defendant in error established his price for carrying the goods of the plaintiff in error with a view to the payment of the tax levied by congress, and therefore he cannot be permitted to collect the amount of the tax in addition to his charge of nine cents per pound. If he did not fix his rates high enough to cover the tax, he had the power to do so, and cannot complain of the omission.

The judgment of the district court is reversed, with costs, and judgment will be entered in this court in favor of the plaintiff in error and against the defendant in error for the sum of $482.67.

Reversed.

DUNTON *v.* MONTOYO.

1 99
5 69

PLEADINGS—*must be in the English language.* Pleadings in probate courts must be in the English language.

Error to Probate Court, Las Animas County.

Mr. A. A. BRADFORD, for plaintiff in error.

Mr. G. W. MILLER, for defendant in error.

Assumpsit by defendant in error against plaintiff in error.

EYSTER, J. Quite a number of errors are assigned by the plaintiff in error. We do not wish to review the whole of them. It is enough to say, that the declaration in the case was in the Spanish language. It is not to be tolerated in this country, that judicial proceedings should be in any other than the adopted language of the nation. To argue this proposition would be useless, and for this reason, the judgment of the court below is reversed.

We cannot after an examination send this cause to the probate court for a new trial. The whole record and proceedings are so utterly at variance with the known rules of practice, that we feel compelled to order, that the entire proceeding be dismissed from the docket of the probate judge, and judgment will be so entered.

Reversed.

---

1 100
2 473

WOODBURY et al. *v.* GRIMES et al.

ACT REPEALED. The act of 1864 (3 Sess. 102), relating to mechanic's liens was repealed by the act of 1867 (6 Sess. 75) upon the same subject.

EFFECT *of repeal of mechanic's lien law.* Leins existing under the act of 1864 fell when that act was repealed, unless within the saving clause of the 28th section of the act of 1867.

CONSTITUTIONAL LAW — *mechanic's lien.* Liens established by the act of 1864 are not protected from legislative interference by the clause of the constitution of the United States which relates to the obligation of contracts.

Error to District Court, Gilpin County.

SECTION 28 of the act of 1867 (6 Sess. 81) is as follows:

"That 'An act creating a lien in favor of mechanics and others,' approved March 11, 1864, and all other acts or parts of acts incon-

sistent with, or in conflict with, this act, be and the same are hereby repealed; but nothing contained in this section shall be so construed as to affect any proceeding now pending in any of the courts of this territory under the provisions of the act hereby repealed."

This act was approved January 11, 1867.

The bill was filed March 20, 1867, and it was alleged in the bill that the cause of action accrued December 10, 1866.

Mr. E. T. WELLS, for plaintiffs in error.

Mr. A. MARSH, for defendants in error.

HALLETT, C. J. The plaintiffs in error seek to establish a mechanic's lien, upon certain premises of the defendant Grimes, under the act of 1864. That act was repealed by the act of 1867, and the principal question presented in this record is, concerning the effect of such repeal upon liens founded upon the act first mentioned. In the first place, it is contended that the legislative assembly, in repealing the act of 1864, did not intend to divest liens which arose under that act, upon the ground that the repealing act is substantially the same as the original act. It is true that many of the provisions of the first act are incorporated in the act of 1867, but these provisions relate mainly to proceedings for enforcing the lien, and not to the lien itself. The opening section of the two acts in which the lien is given differs in language and in substance. The act of 1864 prescribes the quantity of land to be affected by the lien, while the act of 1867 fixes no limit; the former act gives a lien to sub-contractors, and requires a statement of the amount due, together with a description of the property, to be filed with the recorder of the county, points upon which the later act is silent. The former act contains no reference to lode mining claims, upon which a lien is given by the act of 1867. Perhaps other differences might be pointed out, but we think it is sufficient to show that there are substantial differences. When a law is re-enacted in the same language, or in language which is substantially the same, the new act taking effect simultaneously with the repeal of the

old, we may well enough say that the law, though displaced and instantly replaced, has suffered no interruption. And this is what we understand the supreme court to say in *Steamship Co.* v. *Joliffe*, 2 Wall. 450. But when the legislative assembly, upon a subject which has previously received its attention, frames a new law identical with the first in some features, but differing from it widely in others, and expressly repeals the first act, it would be an extraordinary exercise of judicial power to declare the first act in force notwithstanding such repeal. It is not sufficient that the repealed and repealing acts should have points of identity, but the latter must be substantially the same as the former. The repealing section of the act of 1867 contained a clause, "That nothing contained in this section shall be so construed as to affect any proceeding now pending in any of the courts of this territory, under the provisions of the act hereby repealed." With this language before us, we are certainly at liberty to believe that the legislative assembly thought it necessary to protect parties, who had instituted proceedings under the act of 1864, from the effect of the repeal of that act. Now this is not at all consistent with the notion that the legislature designed that the act should remain in force as to all cases which arose under it, for "*expressio unius est exclusio alterius.*" If a saving clause was necessary to protect those who had commenced proceedings under the act of 1864 from the effect of the repeal, why was it not necessary as to those who had not commenced such proceedings? We cannot answer this question in any way that will support the theory of the plaintiffs in error, that the legislature intended to continue the act as to cases which arose under it. As this is a question of intent, we may certainly look to the language of the act for the purpose of ascertaining the intention, and we think no one can read the twenty-eighth section of the act of 1867 without being convinced that the legislative assembly intended to repeal the act of 1864 to all intents and purposes, except as to cases in which proceedings to enforce the lien were pending in some court. It is also urged that

liens founded upon the act of 1864 are contracts protected from hostile legislation by the constitution of the United States, and therefore the lien in this case was not in any way affected by the repeal of that act. It was said in *Bronson* v. *Kinzie:* "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right;" and we have appreciated this difficulty in our efforts to arrive at a correct conclusion in this case. It is, indeed, "manifest that the obligation of a contract and the rights of a party under it may, in effect, be destroyed by denying a remedy altogether, or may be seriously impaired by burdening the proceedings with new conditions and restrictions so as to make the remedy hardly worth pursuing." Bearing in mind that "whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract," we proceed to inquire whether the act of 1864 gave a remedy, of which the legislative assembly could deprive the plaintiffs in error without impairing the obligation of the contract. In the first place, it is noticeable that the act does not establish contracts between parties, but gives a remedy upon contracts made without its aid. Its first words are: "Any person to whom a debt is due for labor performed or material furnished and actually used in the erection, construction, alteration or repair of any house, mill, building or structure." Now a debt cannot be due except upon a contract, express or implied, and, therefore, the act assumes the existence of a contract, but does not create it. Furthermore, the common law gives an action to recover the value of labor and material furnished, and, therefore, in every case of lien under the statute there was a perfect contract and a common-law remedy to enforce it independent of the statute. We are, then, authorized to say that the act of 1864 gave a new and additional remedy in a familiar class of cases. If we contrast this new remedy with the pre-existing common-law remedy, we shall find that the debtor

was equally bound to pay his creditor under both of them; in other words, the statute did not increase or diminish the obligation to pay previously resting upon the debtor. The statute enabled the creditor to appropriate the land upon which he labored, and placed his materials, together with the structure which he erected, to the payment of his debt, but it did not add to the legal liability of the debtor arising from the contract to pay his creditor. Both before and after the passage of the act, the common law gave to the creditor the right to resort to the property of the debtor for the purpose of satisfying his demand, so that, in this respect, the new remedy was not different from the old. But there was one, and but one, essential difference between the two remedies. Under the statute, a lien upon the property benefited by the labor and materials of the creditor arose contemporaneously with the contract, preventing alienation by the debtor to the prejudice of the creditor, and giving to the creditor a preference over all other creditors of the debtor who should subsequently acquire liens upon that property, while, by the law as it existed before the statute, no such lien was established until judgment was obtained. Now it is plain that the statute was important to the lien creditor only in case of a contest with the grantees or creditors of the debtor, and that it did not essentially change the relations between the debtor and creditor. The statute gave to the lien creditor a preference over the grantees and creditors of the debtor who had not, at the date of the contract, acquired a lien upon the property, but it did not subject the property of the debtor to the payment of the lien creditor's demand in any degree or manner more advantageous to the creditor than the general law. The statute did no more than prescribe a rule of priority and preference among creditors and incumbrancers, which was different from that given by the general law. Now we understand that legislative interference among the creditors and grantees of a debtor, which has the effect to postpone one for the benefit of another, is not prohibited by the constitution. It was said in *Jackson* v.

Lamphire, 3 Pet. 290, and repeated with approbation in *McCracken* v. *Heyward*, 2 How. 613: "It is within the undoubted power of State legislatures to pass recording acts by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time, and the power is the same whether the deed is dated before or after the passage of the recording act; though the effect of such a law is to render the prior deed fraudulent and void as against a subsequent purchaser, it is not a law impairing the obligation of contracts." The act of 1864 stands upon a similar principle. It postponed creditors and grantees of the debtor to the mechanic and material man, but it did not touch the obligations of the contract. In a struggle between creditors and grantees it might be decisive of the contest, but it did not affect the relation of debtor and creditor.

The counsel for plaintiffs in error has, with much industry and ability, drawn from the decisions of the supreme court many passages which appear to sustain his views. It must not be forgotten, however, that the language of each case was spoken with reference to the points before the court. We find, in the reports of that court, no case like the one under consideration. In *Bronson* v. *Kinzie*, no question arose between contesting claimants, and the law imposed new conditions and restrictions upon the sale of the mortgaged property for the benefit of the mortgagor. So, in *McCracken* v. *Heyward*, 2 How. 608, new conditions and restrictions were prescribed respecting the sale of property under judgments at law for the benefit of the debtor. In the case at bar, as we have seen, the act of 1864 established a preference between creditors and grantees, but did not affect the debtor. In *Steamship Co.* v. *Joliffe*, 2 Wall. 450, the statute alone gave the right and the remedy, and it was declared to be within the constitutional provision. If subject to repeal, the creditor's demand would have fallen with the statute, and nothing would have been left to him. In the case at bar, it was only the creditor's preference over other creditors and grantees of his debtor which rested upon

the statute, and that, as we have seen, was within legislative control. As the act of 1864 established a rule respecting the administration and distribution of a debtor's property, we think it was not secured to the plaintiff in error by any constitutional provision. After it was repealed, a substantial remedy against the debtor Grimes, according to the course of justice as it existed at the time the contract was made, was left to the plaintiffs in error, and this was sufficient to satisfy the constitutional requirement. Cooley's Limitations, 286; *Stocking* v. *Hunt*, 3 Denio, 274; *Conkey* v. *Hart*, 14 N. Y. 22. The plaintiffs in error also aver that their lien has been restored by an act passed in the year 1868. It is not necessary to consider the effect of this restoring act, for the reason that it was not passed until long after these proceedings were commenced. At the time when this petition was filed, the act upon which it was founded was inoperative, and, therefore, the petition was properly dismissed.

The decree of the district court is affirmed, with costs.

Affirmed.

CRANDALL *v.* STERLING GOLD MINING CO.

JUDICIAL NOTICE — *laws of Kansas Territory.* If the laws of the late territory of Kansas, relating to the descent of real estate, were at any time in force in this territory, they are to be judicially noticed, and need not be proved at the trial.

KANSAS TERRITORY, *laws of, relating to descent of real estate.* In November, 1860, there were three statutes in Kansas relating to the descent of real estate. By the first, the widow had one-half the real estate of her deceased husband, the other half going to the children of the marriage and of the husband. By the second, she had one-half in value of the realty to be set apart to her under the direction of the court. By the third, she was endowed of the third part of all the lands whereof her husband was seized, of an estate of inheritance during coverture. She was required to elect between these acts within six months after the death of her husband.

ELECTION — *effect of widow's failure to make.* In ejectment by a widow claiming as heir to her deceased husband's estate, under the first of the acts

mentioned, it did not appear that she had declared her election to take under that statute within the time prescribed. *Held*, that she could not recover.

Appeal from District Court, Gilpin County.

Mr. E. T. WELLS, for appellant.

Messrs. JOHNSON & TELLER, for appellee.

HALLETT, C. J. The plaintiff alleges that her husband, in his life-time, was seized of an interest in a claim on the Bobtail Lode, in Gilpin county, to one-half of which she became entitled upon his death, which occurred in the month of November, 1860. She avers that, in November, 1860, the premises in controversy were within the limits of the late territory of Kansas, and that, by a law of that territory, upon the death of her husband she became entitled to the estate, which she now seeks to recover. Upon the trial in the court below, no evidence was offered to show that Kansas territory included within its boundaries the district of country now known as the county of Gilpin, and probably the district court was required to take judicial notice of that fact, if it exists. We shall not consider this interesting question, nor shall we consider another question of greater interest which relates to the force and effect of the laws of Kansas territory in a case of this kind. We shall pass these and other questions presented in this record, and place our decision upon ground which is entirely satisfactory to us.

Assuming, *argumenti gratia*, that the district of country now known as the county of Gilpin was, at the death of plaintiff's husband in November, 1860, in the territory of Kansas, and that the law of descent of that territory is to be applied to this case, we propose to inquire whether, by that law, the plaintiff is invested with any estate in the premises in controversy. Upon the trial in the court below, the plaintiff gave in evidence the law of Kansas territory, approved February 7, 1859, upon which she relies; another act, entitled "An act relating to dower," approved Feb-

ruary 27, 1860, affecting that upon which the plaintiff relies, was not given in evidence, and, therefore, we must first ascertain whether we can consider the act of 1860 in connection with the former law. Upon this point it is to be observed that these laws are not foreign to our territory in the sense in which the laws of one State or territory are said to be foreign to every other State and territory. We say that laws are foreign when they emanate from a jurisdiction territorially distinct and separate from our own. As to the premises in controversy, the jurisdiction of the territory of Kansas was coincident with our own, but precedent in the order of time. If the plaintiff had sought her remedy immediately after the alleged devolution of this estate, the forum in which she would have appeared and the law governing the case were provided by the territory of Kansas, and, in that event, no proof of the law would have been required. Since then the forum has been changed, but, upon the theory of the plaintiff, the law remains the same. We are told that the law of descent of Kansas territory is to be applied to all cases that arose within her boundaries while she held dominion. If so, it is to be as fully and as generally applied to such cases as is our own law to cases arising within our territory since the organization thereof, and the first is as much a part of our general law as the last. With respect to the point under consideration, we may say that these Kansas laws, if effectual as claimed by the plaintiff, stand upon the same footing as those acts of our own assembly, which have been repealed; if rights have accrued under them, whenever those rights are questioned, they are the subject of judicial cognizance in the same manner as if still in force. The case of *United States* v. *Turner et al.*, 11 How. 663, is instructive upon this point. In the district court of Louisiana a question arose concerning the validity of an instrument under the laws of Spain, in force in the province of Louisiana before the purchase, and counsel moved for an issue upon the points to be tried by a jury. This motion was denied, and the ruling was sanctioned by the supreme

court in language which, with a change of names, may be applied to the point we are considering.

"The Spanish laws which formerly prevailed in Louisiana, and upon which the titles of land in that State depend, must be judicially noticed and expounded by the court like the laws affecting titles to real property in any other State. They are questions of law and not questions of fact, and are always so regarded and treated in the courts of Louisiana."

The case of *Henthorn* v. *Doe*, 1 Blackf. 160, is equally to the point. There laws of Virginia, affecting title to real property in Indiana, were judicially recognized by the supreme court of the latter State in a decision which is very convincing upon this point. Upon reason and authority, therefore, we say, that if the law of descent of Kansas territory is to be applied to this case, it lies within the range of judicial information and need not be established by proof, and the act of 1860 is as fully known to us in a legal sense as that which was given in evidence upon the trial in the court below.

The second section of the act of 1860 mentions two acts which, together with the act of 1860, appear to have been in force at the time of the death of plaintiff's husband in November of that year. By the act under which plaintiff claims, which was the eldest of the three, a widow took one-half the real estate of her deceased husband, and the children of the marriage and of the husband took the remaining half. It seems that, under this act, partition of the property among the beneficiaries was not contemplated. Laws Kansas Ter. 1859, p. 565. By the second act the widow became the owner in fee of one-half in value of the realty, to be set apart to her under the direction of the court. Laws Kansas Ter. 1859, p. 381. By the third act, which we have referred to as the act of 1860, the widow was "endowed of the third part of all the lands whereof her husband or any other person to his use was seized of an estate of inheritance at any time during the marriage to which she shall not have relinquished her right of dower, in the man-

ner prescribed by law, to hold and enjoy during her natural life." Laws Kansas Ter. 1860, p. 110.

These several distinct and widely different estates were offered to widows by the laws of Kansas territory, but it was necessary that she should elect between them. If the statute was silent as to election there could be little doubt as to the intention of the law, for obviously the widow could not be allowed to hold under all these acts and thus absorb the estate, leaving nothing for the children. But the statute was not silent upon this point. In the second section of the act of 1860, it was enacted as follows:

"Every widow, within six months from the death of her husband, may, as she may prefer, use for her benefit either the provisions of this act or those of an act entitled, 'An act concerning descent and distributions." Approved February 8, 1859, or an act entitled, 'An act to protect the rights of married women, and in relation to the liabilities incident to the married contract relation.' Approved February 7, 1859."

We learn from this that the widow could have the benefit of but one of the acts, making provision for her out of the estate of her deceased husband, and that six months were allowed her to determine which of the several acts she would invoke. Under these statutes upon the death of a husband intestate nothing could be done toward vesting his estate in the heirs until the widow should choose between the several laws designed for her use. The widow had only an inchoate right prior to election, for until then the law, ignorant whether she would have a dower estate or an estate in fee, could not operate in her behalf. In justice to the children of the marriage and of the deceased husband the widow ought to have been and was required to make her election at an early day. Moved by such considerations doubtless the legislature of Kansas territory declared that the widow should elect between the several acts, securing to her an interest in her husband's estate within the six months succeeding his death, and this wise limitation is to

be enforced for the repose of estates and because it is the legislative will.

Under statutes and at the common law it has often been decided that a widow failing to elect between dower and a devise shall be held to have accepted the devise. *Pratt* v. *Felton*, 4 Cush. 175.

But this is upon the ground that a will is effectual unless expressly renounced. It needs no invocation to awaken its transmitting power, but bestows its gift unasked, unless the beneficiary expressly decline it. Not so however here, for the statute of 1860 requires that the widow shall be active in declaring her preference. If we say that in case of non-election she shall have an estate under one of the acts to which we have referred, how shall we choose between the several statutes? We are unable to do it. No one of these statutes could become efficient until its aid was invoked.

If the plaintiff here passively allowed the six months succeeding her husband's death to pass without manifesting by word or act her desire to hold under either one of these acts, she must suffer the loss resulting from her laches. We find no evidence in the record showing that the plaintiff, within the time prescribed by the act of 1860, elected to take the estate she now claims under the act of February 7, 1859. Perhaps the bringing of a suit would show an election, but if so, this suit was not brought until 1866, long after the law, weary of the plaintiff's delay, had turned to other representatives of her deceased husband.

In the absence of evidence upon this point, we think the judgment of the district court was correctly given for the defendant.

The judgment of the district court affirmed, with costs.

Affirmed.

MALONEY v. GRIMES.

1 111
3 415

ATTACHMENT — *distributing proceeds of attached* property among creditors. The twenty-sixth section of the attachment act provides for *pro rata* dis-

tribution of the proceeds of attached property among creditors who have sued out writs returnable, and returned to the same term of court.

Where several creditors attached the same property, under writs returnable to different terms of court, the rule of precedence, as modified by statute, requires that they should be classified with reference to the terms of court to which their writs are returnable, and gives preference to the several classes according to priority of service.

If property is attached in several contemporaneous proceedings, whether commenced to the same term or to different terms, and whether the property be sold under process issued in one or all of the suits, the proceeds of the property should be distributed among the several creditors according to the foregoing rules.

SALE OF ATTACHED PROPERTY — *effect of, upon contemporaneous liens.* Where several attachment writs were commenced to different terms of court, and all the suits were levied upon the same property, and all the suits were pending at the same time, and the property was sold under judgments obtained in the suits first commenced: *Held*, that all the creditors were entitled to share in the proceeds of the sale, and the liens of the several attachments upon the attached property were divested by the sale.

SALE OF PROPERTY *upon redemption by judgment creditor does not inure to the benefit of other creditors.* An attaching creditor, having obtained judgment redeemed from a sale made under a judgment obtained in another attachment suit, and caused the premises to be re-sold pursuant to sections 14 and 15, chapter 48, Revised Statutes: *Held*, that other creditors, who had commenced suit by attachment to the same term with the redeeming creditor, were not entitled to share in the proceeds of such re-sale.

Appeal from District Court, Gilpin County.

AN agreed case was submitted to the district court as follows:

"Previous to April term, A. D. 1867, of said court two writs of attachment were issued in favor of Woodbury & Co. and John Tierney, respectively, against the Mammoth Gold Mining Co. of Colorado, both returnable and returned to said term, and both levied upon certain real estate of said corporation. At July term, 1867, judgment was rendered in favor of plaintiffs in each of these causes.

"September 30, 1867, the premises attached were sold upon special execution issued on these two judgments, and Woodbury and Co. became the purchasers. All these proceedings were regular. Previous to July term, A. D. 1867, divers writs of attachment issued against the same Mam-

moth Gold Mining Co., one in favor of Wm. Moller and one in favor of said Dennis Maloney, all returnable to the July term of said court, 1867, all of which were returned to that term levied upon the said real estate before attached at suit of Woodbury & Co. and Tierney. The writ issued in favor of Moller was served upon the agent of the corporation defendant, that in favor of the appellant was returned 'not found' and service by publication was made.

"At the October term of court Moller recovered judgment for $39,485.36 damages and Maloney for $205 damages; said judgments still are in full force and unsatisfied. March 30, 1868, the time allowed to the said Mammoth Gold Mining Co. to redeem the lands sold under the executions of Woodbury & Co. and Tierney from such sale having expired, and no such redemption having been made, Moller sued out his special execution upon his judgment and redeemed the premises and afterward procured the appellee to sell the premises on his aforesaid execution. All these proceedings were regular. At the sale on Moller's execution, the premises were sold for the sum of $20,000, of which, after deducting $2,520, paid by Moller to redeem from such prior sale, and the costs on the execution, there remains in the hands of said sheriff the sum of $17,121.93. That it shall be submitted to the district court to determine whether said sum of $17,121.93 ought to be paid by the sheriff to Moller upon and in satisfaction of his execution, or whether the whole sum of $20,000, after deducting the redemption-money paid by Moller, ought to be distributed among all the creditors of the corporation, who recovered judgments against said corporation in actions commenced by writs of attachment, returned and returnable to the July term, 1867, of said court. Either party may appeal from any final order made by the district court in pursuance of this stipulation to the supreme court without filing bond, and the supreme court may determine the same questions," etc.

June 26, 1868, appellant applied to the district court for a rule on the clerk to make assessment of the amount due him out of the moneys in the hands of the sheriff, as

appears by the stipulation heretofore filed, and that the sheriff, defendant, etc., be required to pay to him the amount so assessed. This motion was denied, and the sheriff was ordered to pay the moneys in his hands to Moller.

Mr. E. T. WELLS, for appellant.

Messrs. JOHNSON & TELLER, for appellee.

HALLETT, C. J. Appellant's claim to share in the fund in the hands of appellee is based upon the twenty-sixth section of the attachment act. Laws of 1861, p. 210. That section provides for *pro rata* distribution of the proceeds of attached property among creditors who have sued out writs returnable and returned to the same term of court, and levied the same upon such property. It will be observed that this section extends to cases in which the writs are returnable and returned to the same term of court, thus leaving the cases in which the writs are not so returnable to the operation of the general rule, which is, that creditors are entitled to satisfaction out of the proceeds of attached property in the order in point of time in which their writs are levied. Drake on Attachment (2d. ed.), § 231. The effect of the section is to place upon an equal footing all attaching creditors who come into court at the same term; but no provision is made respecting cases in which the writs are returnable to different terms. When several creditors attach the same property under writs returnable to different terms of court, the rule of precedence, as modified by the statute, requires that they should be classified with reference to the terms of court to which their writs are returnable, and gives preference to the several classes according to priority of service. In this view while the creditors, Woodbury and Tierney, who sued at the April term, 1867, of the district court, were upon an equal footing, their lien upon the property attached was superior to the lien of those creditors, of whom appellant was one, who sued at the July term, 1867, of the court. All the creditors, however, attached the same property, and

all of them were entitled to satisfaction out of it, if the proceeds should be sufficient to pay all. In this state of law and fact we plainly see what were the rights of the several creditors respecting the fund realized from the sale of the attached property. In the State of Illinois, under a similar statute, it is the practice to hold the proceeds of attached property for distribution among the creditors according to their several rights. *Warren* v. *Iscarian Community*, 16 Ill. 114. This seems to be a convenient if not necessary rule, saving the expense of numerous sales, preventing confusion of title as to the property sold, and securing to creditors a just distribution of the fund. Under this rule it is not material whether attached property is sold under process issued in one or another or all of several contemporaneous attachment proceedings, the effect of the sale being to transfer the lien of the attachments from the property to the fund obtained therefrom. However the sale may be made, when the money is brought into court it will be applied to the payment of the several judgments, according to the rule of preference and distribution to which I have referred. Here then were several attachment suits commenced to the April and July terms of court, in the year 1867, the writs being levied upon the same property, and all of the suits pending at the same time. The property was sold, and, as we have seen, all of the creditors, including Moller and the appellant, whose suits were pending contemporaneously, were entitled to share in the proceeds. Woodbury and Tierney were upon equal terms, but, in virtue of the prior service of their writs, they were entitled to be first paid in full. Moller, the appellant and the other creditors who sued at the July term of court, were upon equal terms, but having brought their suits to a term of court, subsequent to a term at which Woodbury and Tierney sued, their liens were subordinate to the liens of the creditors last named.

By the sale of the property the proceedings became fruitful, and the remedy which the creditors sought was obtained. The right to participate in the proceeds of the attached prop-

erty was then enjoyed by the appellant, if any thing remained after paying the Woodbury and Tierney judgments, and if nothing was received by him it was because the proceeds were not greater than the sum of the Woodbury and Tierney judgments, and not from any defect in the law. It matters not that the property was sold upon execution issued upon the judgments of Woodbury and Tierney, the other suits were pending at the time of sale, and all were entitled to participate in the proceeds, giving to each his due share and preference as fixed by law. The appellant, having once enjoyed the right to share in the proceeds of the attached property, cannot again claim that right. With the sale of the property and the distribution of the fund, the attachment proceedings as such ended. If the appellant obtained judgment *in personam*, he may collect it in any way known to the law, but his right so to proceed is secured by the judgment rather than the attachment. Probably one who has obtained judgment *in rem* may redeem the property affected by his judgment from another sale, but if so, the right is secured to him as a judgment creditor, not by the attachment as such. But it is not necessary to decide this point, inasmuch as no question is made touching the regularity of Moller's proceedings, and we are now only concerned with the distribution of the funds received from the sale of the property under his execution.

It appears to be unnecessary to advert to the doctrine often recognized by the supreme court of the State of Illinois, that a redeeming creditor, or the purchaser at the sale made after redemption, is subrogated to the rights of the first purchaser. *McLagan* v. *Brown*, 11 Ill. 519; *Johnson et al.* v. *Baker*, 38 id. 98; *Blair et al.* v. *Chamberlain et al.*, 39 id. 521; *Massey* v. *Westcott et al.*, 40 id. 160.

It is difficult to harmonize *Turney et al.* v. *Young*, 22 Ill. 255, with the foregoing cases, but if it is opposed to them it must be regarded as overruled by later decisions. If, according to this doctrine, the purchaser at the sale after redemption acquired a right beginning with the sale under the Woodbury and Tierney judgments, certainly the right

of the appellant to satisfaction from the property was extinguished by the sale last mentioned. In conclusion, it is well to notice that the statute under which the creditor Moller redeemed, and upon which his claim to the money obtained upon sale of the property under his execution is founded (Laws 1861, p. 267, § 15), is not at all ambiguous. The right to redeem is given to "any judgment creditor," without reference to the character of his judgment or the manner in which it was obtained, and whether it is or is not a lien upon the estate to be redeemed. The sole qualification necessary to the right of redeeming is, that the party claiming such right shall be the judgment creditor of the debtor who owned the estate which he seeks to redeem. It is also declared that if the property redeemed shall sell for more than the redemption money and interest, "the excess, over and above the amount of the same, shall be applied as a credit on the execution under which the redemption shall have been made."

If in any case it should be adjudged that there was a charge upon the estate redeemed under this plain declaration of the statute, it is doubtful whether the money obtained by sale after redemption could be applied to the satisfaction of such charge. I am inclined to think that the law holds out to every judgment creditor the inducement to redeem, that he shall have in satisfaction of his judgment whatever he can obtain over and above the amount of his disbursements upon another sale of the property. But as before stated, appellant's right to satisfy his judgment out of the property attached by him arose and was enjoyed upon the first sale thereof and cannot be asserted again.

Therefore the judgment of the district court is affirmed.

Affirmed.

HOWARD v. SHERWOOD.

ARBITRAMENT — *evidence of submission.* **A certificate of a county clerk, to the effect that a controversy relating to a mule was submitted to him by**

agreement of the parties claiming the mule, is not evidence that the parties did so agree.

POSSESSION — *illegal award — evidence.* A certificate of a county clerk, to the effect that a controversy relating to a mule was submitted to him by agreement of parties, and that the property was awarded to the defendant, cannot be given in evidence to show that the possession of the defendant was lawful.

DEMAND AND REFUSAL *in replevin — evidence.* In an action of replevin it appeared that plaintiff demanded the property from the defendant the day before the suit was commenced, and the defendant agreed to take the property to a place named on the following day. On the following day the suit was commenced and the defendant contested it at every step. *Held*, that there was sufficient evidence of demand and refusal.

It is not necessary that a defendant in replevin should expressly refuse to comply with a demand for property. If he neglect to deliver it and contest the suit, he cannot, after verdict, be permitted to say that he intended to avoid litigation by surrendering the property before suit.

Appeal from District Court, Jefferson County.

AT the trial, J. W. Mosby testified on behalf of the plaintiff, that the plaintiff demanded the property from the defendant, at Boulder, before the commencement of the suit; the defendant had the mule in his possession at that time; the mule belonged to plaintiff; the demand was made the day before this suit was commenced.

On cross-examination, the witness testified that plaintiff had possession of the mule and used it in 1865; the mule left in January or February, 1865. I next saw it in defendant's possession; plaintiff told defendant it was his mule and he had fetched a witness to prove it; plaintiff left the mule, and defendant agreed to bring it to Boulder City that evening or next day; defendant took the mule to Boulder the next day; he did not deliver it to plaintiff.

George R. Strouse testified that he knew the mule and that it belonged to plaintiff.

The defendant offered a transcript from the records of Boulder county, which consisted of a subpœna issued by James Hubbard, a justice of the peace, directed to a constable, commanding him to summon three persons named to testify concerning the description and value of certain property taken up as "estray" by defendant below. An

affidavit, by defendant below, respecting certain property taken up by him as "estray," among which was one brown mule, also the report of certain appraisers as to the value of the property taken up by defendant below; also a certificate of the county clerk of Boulder county, as follows:

"J. M. SHERWOOD
v.
N. M. HOWARD. } ss.

"The above entitled cause coming on to be heard before the county clerk of Boulder county, Col. ter., this 17th day of June, A. D. 1867. By agreement of the parties to have the title of one brown mare mule branded on left shoulder with figure (5), taken up by N. M. Howard, and now claimed by Jessy Sherwood, adjusted.

"Whereupon, after hearing the evidence of both parties, it was decided against the said Sherwood, and the property in controversy was not the property of said Sherwood, and that he was not entitled to the possession thereof, but that the said N. M. Howard was entitled to the possession thereof.

"W. A. CORSON,
"*County clerk of Boulder county, C. T.*"

Plaintiff objected to these papers, and the court excluded them.

Mr. Justice GORSLINE did not participate in the decision.

Mr. G. BERKLEY, Mr. G. W. CHAMBERLIN, and J. F. BOSTWICK, for appellant.

HALLETT, C. J. Upon the trial in the court below, a transcript of the record of Boulder county, showing that upon a hearing before the clerk of that county, the property in controversy was awarded to appellant, was offered as evidence, and, upon objection by appellee, excluded from the jury. It is contended that this paper should have been admitted for the purpose of showing that appellant's possession of the mule was lawful, and that such possession would only become unlawful upon demand made after the award made by the county clerk, and a refusal by appellant

to deliver the property. The argument is founded upon the assumption that appellee agreed with appellant to submit the matters in controversy to the decision of the county clerk. There is no evidence of any such agreement and therefore the argument fails. It is true, that it is stated in the transcript that the clerk proceeded upon the agreement of the parties, but it is not necessary to say that this is not sufficient. As there is no evidence of any authority in the clerk to decide the controversy the paper was properly excluded. There are other objections to the transcript, but it is not necessary to dwell upon them.

It is also urged that the evidence in the court below was not sufficient to show a demand and refusal. Upon this point there was evidence tending to prove that appellee demanded the property the day before the suit was commenced, and that appellant agreed to take it to Boulder the next day. In accordance with this agreement the mule was taken to Boulder on the following day, when appellee replevied it. Respecting the demand there seems to be no question, and if we connect the evidence with the acts of appellant as shown by the record, the refusal will be no less clear. When appellant arrived at Boulder on the day the suit was brought, he did not surrender the property to appellee, but, upon service of the writ, he gave bond and retained possession of it and contested the suit at every step. If he had delivered the property at that time, even if the writ had been in the hands of the officer, the controversy would have been reduced to a question of costs. Upon this point the acts of appellant are as convincing as the most positive testimony. He had the opportunity to comply with appellee's demand for the property, and he declined to accept it. If he took the property to Boulder, for the purpose of surrendering it to appellee, he could have done so, and the fact that he did not deliver it was sufficient to warrant the jury in finding that he had no intention to give it up without litigation. It is not necessary that a defendant in replevin should expressly refuse to comply with a demand for property. If he neglect to

deliver it and contest the suit, he cannot, after verdict, be permitted to say that he intended to avoid litigation by surrendering the property before suit. Other errors assigned have not been mentioned in the argument, and we think it unnecessary to notice them.

The judgment of the district court is affirmed, with costs.

Affirmed.

SMITH v. THE PEOPLE.

1 121
2 560

1 121
22 55

1 121
23 497

1 121
†26 311

1 121
†27 306
27 306

1 121
31 290
†31 291

RECORD — COMMON LAW — *how constituted.* At common law the testimony of witnesses, the opinions of the court upon questions of evidence, the charge of the court to the jury, and other incidents attending the trial of a cause, did not appear in the record.

RECORD — BILL OF EXCEPTIONS — *statute of Westminster.* The statute of Westminster which gave the bill of exception had no application to criminal causes.

RECORD — *bill of exceptions in criminal cause.* A statute of this territory (4 Sess. 92) makes it the duty of a judge to sign and seal a bill of exceptions in a criminal cause, when tendered to him, and provides that such bill of exceptions shall be filed by the clerk and shall become a part of the record of such cause.

RECORD OF EXCEPTIONS — *how made.* Exceptions to the rulings, opinions and decisions of the court form no part of the record until they are reduced to writing and signed and sealed by the judge.

And if no exception to the ruling or decision of the court is taken at the trial, the ruling or decision cannot be put on record.

ERROR — *must appear of record.* And error cannot be assigned as to matters not of record.

ERROR — *instructions not excepted to.* Where no exceptions were taken to the ruling of the court as expressed in the instructions to the jury, error cannot be assigned as to such ruling.

VERDICT OF GUILTY — *sufficiency.* Upon an indictment for murder a verdict of guilty is a conviction of the offense charged in the indictment.

NEW TRIAL — *verdict supported by evidence.* Where the prisoner went to the house of deceased with R. and after some words with deceased the prisoner knocked him down, and thereupon R. put a rope around deceased's neck and strangled him to death, and the prisoner and R. carried deceased's body some distance from the house where the homicide was committed and threw it into a running shaft, a new trial will not be granted on the ground that the evidence is not sufficient to support a verdict.

HOMICIDE — INTENT — *unlawful act.* If two or more persons combine to do an unlawful act, and in the prosecution of the unlawful design death ensue to any, the killing will be murder as to all of the participants in the unlawful purpose.

The prisoner having made a violent assault upon deceased and having assisted in carrying away and concealing deceased's body, even if the killing was done by another, the prisoner must be regarded as aiding, abetting and assisting in the perpetration of the crime.

NEW TRIAL — *newly-discovered evidence.* A new trial will not be granted to enable the prisoner to obtain evidence which does not tend to excuse or mitigate the crime.

Error to District Court, Gilpin County.

THE plaintiff in error was indicted for the murder of Wm. Hamblin, and the jury found him guilty. At the trial the evidence was as follows:

John Y. Glendenin testified: In February last I was called by Sheriff Grimes to attend a coroner's inquest upon the body of William Hamblin. I went over with others and found the man in a shaft; we got the body out of the shaft; there was a rope around the neck and another around one of the wrists; I cut the rope off with a knife; there were gashes on Hamblin's head. We examined in the house and found a pool of blood by the door, and this stick (here the witness identified the stick); there was hair on one of these knots and the stick was colored by blood. The place where the body was found and the house are in Gilpin county.

Joseph Harper testified: I was down the road between here and the gate and saw some men gathered together, and they were talking about this murder, etc. The prisoner and several men were there; some of the men asked the prisoner questions; they asked him what made him do such a horrible deed, and what he hit him with? the prisoner said he got mad and hit him with the stool he was sitting on and knocked him down. He said he was likely to get up again and he hit him with a chunk of wood and knocked him down again. The murder occurred a night or two before this conversation; the prisoner said that in struggling around Hamblin made such a fuss that they put a string around his

neck and another around his arm, and hauled him off and put him in a shaft. Both of them hauled him up the hill, one started with him and the other gathered hold and helped. The prisoner said he was sorry that he did it. He said that he knocked Hamblin down twice; there was considerable chat there which I do not now recollect; no threats toward the prisoner were made; we were sitting on a wood pile at the time of the conversation, and the prisoner said that the name of the man who helped him was Robert Reynolds.

Cross-examination: There were about five men present at the conversation with defendant; Mr. Brown, the officer, was there; I don't recollect the others who were present; I remember only Brown and the prisoner; I then supposed that defendant was a prisoner and in charge of the officer; I cannot tell what was said before I came there; they were about sitting down when I came in sight; I do not know whether or not I heard all of the conversation; I am sure the prisoner said he got mad and hit Hamblin with a stool; he referred to himself as the person who got mad; he said something about a chair I think, but I did not hear him say that Hamblin struck him with a chair; I understood that this man struck Hamblin two blows, and Bob Reynolds struck the third blow. I cannot say that the prisoner stated which of them started to drag Hamblin's body to the shaft; he said one started and the other took hold and helped drag Hamblin to the shaft; the prisoner said that he and Bob Reynolds put Hamblin in the shaft.

John C. Bruce testified: I knew William Hamblin in his life-time; he lived in Chase Gulch and he was a milkman; I saw his body just after it was taken from the shaft; the shaft is twenty or thirty yards from the house, in a south-easterly direction. I think it is a little up hill from the house to the shaft; Hamblin's pockets were turned wrong side out when I saw him.

Dr. R. G. Adudell testified: I practice medicine and surgery; I saw the body of William Hamblin in the shaft before it was taken out; the feet were invisible from the

top; from the position in which Hamblin lay in the shaft, I supposed he was thrown in by two persons; if he had been thrown in by one person the body would have gone out of sight; I don't remember whether the body lay on the side or upon the face; the body of Hamblin was taken out of the shaft; there was a ragged wound on the top of the forehead, a rope around the neck very tight, and another rope around the wrist; the rope around the neck was very tight, it was buried in the neck about two-thirds its width; in carrying the body from the house to the shaft, some places it was carried clear of the ground and others it was allowed to drag upon the ground; Hamblin might have been dead twelve or fifteen hours when we came there; there was still warmth in the stove in the house when we came there; the fire had not burned down; I think Hamblin was still alive when the rope was put around his neck; he came to his death by strangulation; the blow on the head would knock him down.

Cross-examination: I think that the body of Hamblin was dropped into the shaft, not thrown down; the position of the body showed this; if the body had been thrown in it would have been doubled up more; I think Hamblin died of strangulation produced by the rope around his neck; I am inclined to believe he was dead before he was taken from the house; I think Hamblin was taken to the shaft by two persons; I did not see any signs of his being dragged by one person, but he might have been dragged by one person near the door; the marks on the ground were of the hips dragging and not the limbs; there were no marks of the heels upon the ground; the appearances were of the body being carried by one person at the head and another at the feet, and the hips sometimes dragging on the ground; I did not see in or about the house any rope of the kind which was around Hamblin's neck; the rope around the neck was of a different twist from that in the house; it had evidently been brought there.

Hinds testified: I was upon the coroner's inquest touching Hamblin's death; before the body was brought up from

the shaft we could see it; it lay upon the back; the body had moved very little from where it first struck; I saw the body when it was hoisted from the shaft; the pockets were turned wrong side out; there were two cords around Hamblin's neck; one of the cords was tied very tightly and the other one loosely; there was no rope about the house like the one that was tight on the neck; there was rope in the house like the one that was loose on the neck; there was water on the stove in the house which was warm; there were gashes on Hamblin's head that could have been made with this stick (referring to the stick mentioned by Mr. Glendenin, in his testimony).

Samuel Merrick testified: I live between Smith's Ranche and Clear Creek, four miles below Black Hawk. The next morning after the killing of Hamblin, two men stopped at my house and got breakfast, and this man here (the prisoner) looks like one of them; they came soon after it was light; I had just got up in the morning.

Cross-examination: This man looks very much like one of the men that stopped there that morning for breakfast; he is of the same build, I suppose that he is one of the men.

John C. Bruce, re-called, testified: I think I have seen the defendant down by Fitzpatrick's mill, in Black Hawk. He was with another colored man. They went off up Chase's Gulch. I saw them about half-past five or six o'clock one Saturday night before the killing of Hamblin. Hamblin was killed on Sunday, and this was the Saturday night before that.

Cross-examination: I know this man's countenance, and I think he is the same man I saw near Fitzpatrick's mill.

Chelton M. Grimes testified: I am the sheriff of Gilpin county; I have had the defendant in my charge since about the middle of February last. We have talked frequently about the murder of Hamblin. I never made any threats against the prisoner or held out any inducements to him to get a confession. The prisoner said that he got into a bad scrape, that it was Reynolds' fault, and that Reynolds got him to go there with him. The prisoner said that Hamblin

used words that he did not like and then he struck Hamblin with a chair; that then Bob struck Hamblin, and then he threw something at Hamblin; I think it was a stick of stove wood, and hit Hamblin on the shoulder and Hamblin fell down. That Bob then hit Hamblin on the head with a stick of stove wood, and Hamblin commenced groaning and making a noise, and Bob put the rope around Hamblin's neck to prevent him from making the noise. The prisoner said that, when Bob put the rope around Hamblin's neck, he told Bob that was wrong, and asked him how he would like to be served that way. Bob said it made no difference, he was dead any how.

He said that Bob put the rope around Hamblin's wrist and asked him to help take Hamblin to the shaft and throw him in. The prisoner said he refused to help Bob at first; that Bob dragged Hamblin out of the house and then he, the prisoner, helped until they got to the shaft, and then Bob threw Hamblin into the shaft. The prisoner said that Bob went down to the house and he went down to the cabin below and stayed there until nearly morning, and then Bob came down and they started off together. He said they went down near the Child's House, at foot of Guy Hill, and stopped in the woods and counseled for awhile, and finally went down to the Child's House, where they had been stopping before. The prisoner said he was very sorry for it; that he had never done any thing like it before. Bob said that he was not sorry; that he had done the like before many a time. The prisoner said they were stopping at the Child's House before the murder; that they left the Child's House the evening of the murder and came up to Hamblin's. The prisoner said they left the Child's House to come up to see Mr. Pickle to get some money he was owing them for wood and to go to Hamblin's and get some blankets Hamblin had of theirs; that they did not see Mr. Pickle; that when they got opposite Mr. Pickle's house Bob didn't want to go there, but wanted to go up to Hamblin's; that they went to Hamblin's about dark and stayed there some time — several hours — before any difficulty

commenced. The prisoner could not tell what time he left Hamblin's house; it was some time in the night; he supposed about eleven o'clock. This conversation occurred about the first opportunity the prisoner had to talk to me after he was put in jail; the prisoner was very anxious to talk to me. I think the first conversation I had with him was before the coroner's inquest was held. I guess it was the first evening after he was brought in; on going in the jail the prisoner was frightened at the crowd around the jail, but he seemed content when I told him that he was in no danger there in the jail, that the crowd couldn't get in there. I do not think the conversation was long after the prisoner was put in jail. After Robert Reynolds was put in he made about the same statement as the defendant. The defendant said Bob locked the door of Hamblin's house and threw the key away, and Bob said the same; they described the place where the key was thrown, and Mr. Hamblin, the brother of the deceased, afterward found it there. I have talked with the prisoner about the matter frequently, and there has been nothing like a denial of guilt on his part until within a few days.

Cross-examined: At the time of the first conversation with the prisoner there was no excitement out of doors. There was a crowd around the door when the prisoner was put in jail, but they went away soon, and at the time of the conversation there was none there. The conversation was two or three hours after the crowd had left; the defendant did not seem to be excited. The defendant said that they were disputing with Hamblin about blankets; that Hamblin refused to give them the blankets, and he struck Hamblin with the stool; that Hamblin struck back and then Bob joined in the fight. I think he said Hamblin ordered them out of doors. Defendant did not speak of time passing between the time Bob got Hamblin out of doors and the time they hauled him off to the shaft; defendant said that Bob threw Hamblin into the shaft. I think defendant said that he stepped out of the door where so much blood was, while the body was there. Defendant did not say that Bob used

threats to compel him to help haul the body of Hamblin away; it seemed that Hamblin and the defendant disputed altogether, and Bob had nothing to say until the fight begun; they talked quietly for some time before the difficulty arose. Within the last few days the defendant has said that Bob was guilty, and he, the defendant, was not guilty.

Re-direct: Bob Reynolds was arrested and brought in four or five days after the defendant was arrested.

A portion of the charge which was given to the jury was as follows:

"In no view which can be taken of the evidence in this cause is the accused guilty of manslaughter; if not guilty of the crime charged in the indictment, he is not guilty of any crime whatsoever under the law."

No exception was taken to any portion of the charge. The counsel for plaintiff in error contended that this instruction was erroneous. The jury returned a verdict of guilty, and a motion for new trial being made and overruled, the plaintiff in error excepted to the ruling of the court upon that motion. Upon the hearing of the motion for new trial, certain affidavits were read as follows:

"THE PEOPLE OF THE TERRITORY OF COLORADO
v.
GEORGE SMITH.

George Smith, being first duly sworn, says he has heard the affidavit of Clara Brown read and knows its contents, that he was not aware of the existence of any such testimony as that contained in the said affidavit until after his trial; that he did the best he could to prepare for his trial, and told his counsel and others for what purpose he went to the house of William Hamblin, and that such purpose was to get his blankets; that he had no knowledge that said Hamblin intended to keep said blankets until he arrived there, and that he had no knowledge whatever that said Hamblin had declared his intention so to do until after the trial of the cause; that he revealed his own case to his counsel and made every effort possible in his circumstances

to prepare for his defense; that his failure to discover the evidence contained in the affidavit of Clara Brown is not the result of his negligence, but that such failure is to be attributed to the fact that the same never was divulged to any one until after his trial.

THE PEOPLE OF THE TERRITORY OF COLORADO
v.
GEORGE SMITH.

Clara Brown, being first duly sworn, says she is a resident of Gilpin county, and knew William Hamblin during his life-time; that on the Thursday morning previous to the Saturday on which he was killed, said Hamblin was at her house in Central City in said county; that on said morning she had a conversation with him, said Hamblin, in respect to some colored men that had been stopping over with him in a cabin, and had been chopping wood; that said Hamblin complained that said colored men had used him badly, had taken away his pistol and some cups and plates belonging to him; but that he, Hamblin, had then in his possession some blankets belonging to them, enough to make him whole in respect to the property taken away by them; that she never told this conversation to said George Smith or his counsel before the trial of said cause, and that she never supposed the same could ever have any thing to do with the trial of said Smith until after the trial, and she had heard what said Smith had said as to going to the house of said Hamblin to get his blankets.

Messrs. JOHNSON & TELLER and Messrs. ROYLE & BUTLER, for plaintiff in error.

Mr. I. N. WILCOXEN and Mr. C. C. POST, for the people.

GORSLINE, J. The plaintiff in error, George Smith, was indicted at the May term, 1868, of the district court of Gilpin county, for the murder of William Hamblin. He was arraigned and pleaded not guilty, and was tried at the same term, the chief justice presiding. The jury returned

a verdict of guilty, and the prisoner sued out a writ of error from this court. There were no exceptions taken at the trial to the decisions of the court in admitting or rejecting testimony, or to the instructions given to the jury in behalf of the people, or to the refusal by the court to give instructions asked for by the prisoner. The only exception taken was to the decision of the court in overruling the motion for a new trial interposed by the prisoner.

The argument of the case in this court was not confined to the exception taken as mentioned above, but extended to a discussion of such instructions given by the court below, as the counsel for the prisoner conceived to be erroneous, and to the refusal to give other instructions asked for by the prisoner. We permitted this, reserving the right to consider whether we could, in accordance with the law, regard matters which were not contained in the record before us.

It becomes us then to determine on this presentation of the case the appellate jurisdiction of this court, and to ascertain whether agreeably to the forms of law we can decide upon matters, which in no legal manner have been submitted for our consideration. At common law a writ of error only carried to the superior court such matters as appeared of record. The testimony of witnesses, the opinions of the court upon questions of evidence, the charge of the court and other incidents attending the trial of a cause never appeared upon the record, and therefore were never removable by writ of error. This rule being extended as well to criminal as to civil cases it followed, as a necessary sequence, that a person convicted of crime, although many errors might have intervened in the course of the trial, was remediless except by an appeal to the consideration of the same court in which such errors occurred.

To remedy this evil the statute of Westminster 2d, 13 Edward I, chapter 31, was enacted, which gave the bill of exceptions. It was considered in England, however, and so adjudged, that this statute, although general and unrestricted in its phraseology and terms, had no application to criminal causes. This statute has been substantially enacted in this

territory, and we suspect in most of the States of the Union. In some of them, however, the courts being of the opinion that the statute did not apply to criminal cases, the legislatures of the respective States were compelled to extend the law specifically to that class of cases. In Pennsylvania, for instance, the orginal statute of Westminster 2d was passed in 1792, yet the court entertaining the opinion that it did not apply to criminal cases, persons under conviction for crime had no redress until the year 1860, when a law was passed which gave defendants, under indictment for murder or voluntary manslaughter, the right to except to the decision of the court upon any point of evidence or law, which exception should be made a part of the record as in civil cases. Thus it will be seen that in that State, previous to 1860, a defendant convicted of murder, notwithstanding errors very dangerous to him might have been committed during the progress of the trial, had no remedy whatever, except perhaps a motion for a new trial, addressed to the same court in which the error occurred. Our statute (Laws 1865, page 92) makes it the duty of the judge before whom any case shall be tried in the district court to sign and seal a bill of exceptions when tendered to him, and provides that such bill of exceptions, when allowed, signed and sealed by the judge, shall be filed by the clerk, and *shall become a part of the record of such cause.* It follows, then, that exceptions to the "rulings, opinions and decisions" of the court, as expressed in the statute, form no part of the record until they are reduced to writing and signed and sealed by the judge; much less can it be said that the proceedings on the trial of a case form a part of the record of such case, when no exceptions whatever were taken to the same. The question now arises, whether this court can, we will not say with propriety, but according to uniform and established rules of law, take cognizance of such proceedings as occurred in the progress of the trial, which do not come before us in any approved or legal manner. To this question there can in our opinion be but one answer. We should wander very far from the line of our duty if we

should assume to determine matters which do not appear in the record before us. The evil consequences of such a precedent would greatly outweigh any good or favorable result which could be derived in a particular case, however important it might be. It would be contrary to the law as we understand it from the nearly uniform decisions of the courts, and we are bound to decide according to law. By doing so we should undertake to review points first made in this court, and not taken in the court below or made a part of the record of the case.

In the case of *Hopkins* v. *The Commonwealth*, 50 Penn. 9, which was also an indictment for murder, the chief justice, in delivering the opinion of the court, with great emphasis inquires, in regard to a point to which no exception had been taken at the trial, if it would not be an impertinent interference with the established course of administering criminal law to obtrude a discussion of the point which was suggested by counsel in the argument. And the court, in that case, held, that they could not legally inquire whether that part of the charge of the court below, to which no exception had been taken, was correct or otherwise. The courts of this country, which proceed according to the course of the common law, have been nearly uniform in their decisions upon this question. There is one remarkable exception, which we will presently notice. The supreme court of the United States has expressed but one language, and has always held that objections to instructions given, or to the refusal to give instructions asked, can only be taken advantage of and preserved by bill of exceptions. *Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall. 592; *Thompson* v. *Riggs*, 5 id. 663. The latter case is somewhat remarkable in this, that the counsel for the defendant in error waived the objection that there was no proper bill of exceptions to raise the principal question involved in the case. Notwithstanding this waiver, the court declined to discuss it on the ground that the record was not properly before them. Justice CLIFFORD, in rendering the opinion of the court, says: "Settled practice in

this court is, that neither the rulings of the court in admitting or rejecting evidence, or in giving or refusing instructions, can be brought here for revision in any other mode than by a regular bill of exceptions." And, in relation to the practice generally, he further says: "Instructions requested or given rest in parol, and do not, in the practice of this court, or in any other court where the common law prevails, become a part of the record unless made so by a regular bill of exceptions, sealed by the judge who presides at the trial." The instructions which are given or refused, or whatever else may transpire, *ore tenus*, during the trial, become no part of the record, any more than do the arguments of counsel, until exceptions to the same are signed and sealed by the judge, when, upon filing the same with the clerk, according to the statute, they form a part of the record. There is a decision, however, in conflict with the opinion we have announced herein, and, we believe, also opposed to the uniform decisions of the courts of common laws in this country and in England. It is in the case of *Falk* v. *The People*, reported in 42 Ill. 331. The question arose upon an instruction given by the circuit court, to which no exception was taken. In the opinion of the court, which upon this point contained no argument, and we suspect that court could find neither reason, argument or authority to sustain the extraordinary decision which they made, we find the following inquiry: "Suppose all the instructions given by a court to a jury in a capital case are wrong, that they do not announce correct legal principles, or, being correct, are inapplicable to the case, and no exceptions are taken to them, would it be the duty of an appellate court, under such circumstances, when the record shows the prisoner has been illegally condemned by misapplication of the law to his case, and he asks a review of the proceedings, that such court, in the face of the record, should pronounce the sentence of death upon him?" Now, with great deference, we say that what is implied by this inquiry is a begging of the whole question. It assumes that, in some manner, not by the record, for as we

have seen, the only way to make an instruction a part of the record is by exception signed and sealed, but perhaps by street rumor, by a newspaper report, or by what some person may have told the court, they are informed that a certain instruction was given. The court evidently makes a point that it is a capital case. In *Shorter* v. *The People*, 2 N. Y. 193, which was an indictment for murder, the court, certainly one of as high authority as that of Illinois, speaking through Justice BRONSON, one of the ablest judges who ever adorned the bench of that State, says: "The law concerning bills of exceptions is the same in criminal as in civil cases," and further says: "We should not allow our feelings to draw us into the making of a bad precedent." In the case of *Gill* v. *The People*, decided at the same term as *Falk* v. *The People*, and reported in the same volume, which was an indictment for an assault with intent to kill, the court absolutely refused to review the proceedings in the circuit court, because they were not preserved by bill of exceptions, and they had no record before them. It will be seen, therefore, that the supreme court of Illinois, in the case of *Falk* v. *The People*, not only contradicted their former decisions but ignored the cases of *Hopkins* v. *The Commonwealth*, *Shorter* v. *The People*, *Thompson* v. *Riggs*, and, we may add, the opinions of respectable courts everywhere. It may be thought that we can consider this case as upon an agreed statement of facts. This cannot be for two reasons. First, the transcript sent up by the clerk of the district court does not contain, nor does it pretend to contain the *facts*, but it does purport to contain the *evidence*, which consists of the testimony of witnesses. Second, Because the rulings and opinions of the district court cannot be reviewed in this manner; it can only be done by bill of exceptions. *Pomeroy's Lessee* v. *State Bank*, 1 Wall. 592. It is alleged as error that the verdict of the jury was informal and insufficient. The verdict was in these words: "We, the jury, find the defendant guilty." Under the indictment in this case the jury might have found the prisoner guilty of manslaughter, and it is urged that

they should have specified in their verdict of what offense they convicted him. We are referred, in support of this proposition, to the case of the *State* v. *Dowd*, 19 Conn. 387, and *McGee* v. *The State*, 8 Mo. 495. It will be found upon examination, however, that these decisions were given under peculiar statutes of those States. In Connecticut the statute prescribed that the jury, if they should find the defendant guilty, should ascertain in their verdict whether it be murder in the first or second degree. The court, in its opinion, states that this is a positive provision of the statute, without any exception or qualification. And so in Missouri the statute provided that, "Upon the trial of any indictment for any offense, where by law there may be conviction of different degrees of such offense, the jury, if they convict the defendant, shall specify in their verdict of what degree of offense they find the defendant guilty." These statutes seem to be imperative, and the courts of those States were compelled to yield obedience to them. We have no statute upon the subject, and our practice has conformed to the general practice of courts in those States where they have no peculiar statutes with reference to the matter.

Mr. Bishop, in his very excellent work on criminal proceedure, vol. 2, sec. 627, says: "That a general verdict of guilty convicts the prisoner of all matters which are well charged against him in the indictment." So are the cases of *The People* v. *Marsh*, 6 Cal. 542; *Bond et al.* v. *The People*, 39 Ill. 26, and numerous others which might be cited. We are of the opinion that this verdict is sufficient in form. The prisoner made a motion in the court below for a new trial, on the ground, among other things, that the verdict was against the law and the evidence, and also because of newly-discovered evidence. This brings up the question as to whether there was sufficient evidence to sustain the verdict. It seems, from the evidence, that the prisoner and Robert Reynolds, both colored men, were at the cabin of Hamblin on the night of the affray, which resulted in his death. For what purpose they were there, is not disclosed. The evidence consisted mainly of the confessions of the prisoner;

some made immediately after his arrest, and some at different times while he was in prison previous to his trial. The first were made in the presence of Joseph Harper, a witness, who testified to them, and who says that the prisoner on being asked why he did such a horrible deed, and what he hit the deceased with, replied that he got mad and hit him with the stool he was sitting on, and knocked him down; that the deceased was likely to get up again, and he hit him with a chunk of wood and knocked him down again; that, in struggling round, Hamblin made such a fuss that *they* put a string around his neck and another around his arm, and hauled him off and put him in a shaft; that the prisoner struck the deceased two blows, and Reynolds struck him once, and that they dragged him to the shaft and put him in. The confessions made by the prisoner to Mr. Grimes, the sheriff, after he was confined in jail, vary in some respects from the foregoing. He admits having commenced the affray by hitting the deceased with the stool and the piece of wood, but says that Bob put the rope around his neck; that he remonstrated with him for so doing, and that Bob replied that it would make no difference, for he was dead anyhow. He also, in these conversations with the sheriff, admitted that he and Reynolds dragged the body to the shaft, and Reynolds threw it in; that Reynolds went back to the house, and he to a cabin below, where they remained until nearly morning, when they went together to the Childs' House at the foot of Guy Hill; that the dispute was between Hamblin and the prisoner about some blankets, and Bob had nothing to say until after the fight commenced. The prisoner also stated that Bob locked the door and threw the key away, describing the place where it was thrown.

Such were mainly the confessions made by the prisoner. The body of the deceased was found in a shaft as proven, some twenty or thirty yards from the house; when found, there was a rope tied tightly around the neck so as to be imbedded in the flesh; another rope, also, loosely drawn around the neck, and another around the wrist were dis-

covered; his pockets were turned wrong side out; there was a pool of blood near the door, and a stick was found colored with blood; there were gashes on the head of the deceased, and the surgeon testified that they were made by blows sufficient to knock him down; the key of the house was found in the place designated by the prisoner. The surgeon also testified that the death was caused by strangulation. Such were the main facts upon which the jury found the verdict of guilty, and the question is, whether upon this evidence the jury were warranted in their conclusion, or whether the verdict should be set aside, and a new trial awarded.

Murder is defined in our statute to be the unlawful killing of a human being in the peace of the people with malice aforethought, either express or implied. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, or where all the circumstances of the killing show an abandoned and malignant heart. These are statutory definitions (Laws of 1861, page 292) and are similar to the common law. We presume that if Reynolds and the prisoner had been tried together, there could have been but little question as to the correctness or justice of the verdict. We also presume that if the confession of the prisoner, as narrated by the witness Harper, stood alone, disconnected from that made to the witness Grimes, there could no lawyer be found, who would question it. In *Rex* v. *Shaw*, 6 Carr. & Payne, 480, the prisoner confessed that he and the deceased quarreled; that the deceased struck him and the prisoner knocked him down; he got up and the prisoner knocked him down again and kicked him, and then put a rope around his neck and dragged him into the ditch. This case only differs from the one at bar in this, that only two participated in the fight and the deceased struck the first blow, certainly under greater provocation than is proven to have existed in this case. "But," said PATTERSON, Justice, "if two persons fight,

and one of them overpowers the other and knocks him down and then puts a rope around his neck and strangles him, that is murder. The act is so willful and deliberate that nothing can justify it." There can be no doubt, we think, that this proposition is correct, and we might cite many more cases of similar purport, if we did not deem it entirely unnecessary. Now the confessions made to Sheriff Grimes stand upon a basis a little different. In those statements the prisoner asserted that Reynolds put the rope around the neck of the deceased against his remonstrances. His statements, however, in regard to the rest of the affray are substantially the same as those related by the witness Harper. It was contended in argument that, although the prisoner commenced the affray, yet the act by which the killing was effected was performed by Reynolds, and therefore he and not the prisoner was the one guilty of murder. We do not believe such to be the law. If two persons combine to do an unlawful act and death ensue, it is considered by writers on criminal law and by the decisions of the courts to be murder as to both of the participants. Here the prisoner, without any provocation which appears in proof, with a stool and with a chunk of wood, knocked the deceased down twice, once at least hitting him on the head, and after his confederate Reynolds had tied the rope around his neck, the prisoner assisted to drag the body some forty or fifty yards to a place of concealment. If this was not murder on the part of the prisoner, we think it cannot be denied that he did stand by and "aid, abet and assist" in the perpetration of the crime. The principle is well stated in the case of *Brennan et al.* v. *The People*, 15 Ill. 511. The court say: "The prisoners may be guilty of murder, although they neither took part in the killing nor assented to any arrangement having for its object the death of Story. It is sufficient that they combined with those committing the deed to do an unlawful act, such as to beat or rob Story, and that he was killed in the attempt to execute the common purpose."

The motion for a new trial was further made on the ground of newly-discovered evidence after the trial and ver-

dict, and was supported by the affidavit of Clara Brown. We cannot conceive that what she states in her affidavit could have made any possible difference in the result. Certainly none in favor of the prisoner. If any thing, it would have told against him, as exposing a motive on the part of these men in being at the cabin of Hamblin, from which the jury might well have inferred a malicious intent.

The prosecution might well have admitted every thing stated in the affidavit as true without any injury to its cause. We believe, therefore, on this whole record, that the prisoner, upon the law and evidence, is guilty of the murder of William Hamblin, and that the jury, in rendering a verdict of guilty, arrived at a correct conclusion.

The judgment of the district court is affirmed.

Affirmed.

A petition for rehearing was presented by counsel for the prisoner, and, at an adjourned session of the court in January following, the petition was denied.

Mr. Justice GORSLINE was not present at that session, and the opinion of the court was drawn up by

HALLETT, C. J. The plaintiff in error asks a rehearing in this cause, mainly upon the ground that the opinion of the court is erroneous upon the question of practice respecting exceptions to instructions given in the court below. This point was very fully considered in the opinion of the court, and we have re-examined it with such care and attention as we are able to command. It is urged that the authorities cited in the opinion of the court are not to be regarded in this territory, for the reason that, in the States from whence they are taken, it is the practice to charge juries orally, while our statute requires such charges to be reduced to writing. In the first place, it is to be observed that it was always the practice in civil cases, and in criminal cases where exceptions were allowed, to write down the part of the charge objected to, and the statute has simply changed the time for putting the charge into writing and

provided that the whole shall be written out, whether objected to or not. We do not perceive that the objection and exception to the ruling of the court, which was always necessary, is, by the statute, rendered unnecessary. The obvious intention of the statute was to prevent mistake or misapprehension respecting the language used by the court, by requiring that the charge should be put into writing, and there is nothing to show that it was intended that the instructions, when written down, should become part of the record. It is not provided that the instructions shall be authenticated in any way whatever, or that they shall be filed among the papers in the cause. It is true that the judge is required to signify his approval by writing the word "given" in the margin of the instructions, and his disapproval by the word "refused," but this is so obviously designed as a mark of distinction rather than of authentication, that we think it not necessary to comment upon it. We cannot lightly assume that it was intended to incorporate the instructions into the record without any authentication whatever. The mere filing of a paper in a cause is not alone sufficient to make it a part of the record. In *McKinney* v. *The People*, 2 Gilm. 551, the rule upon this point was stated as follows:

"In a criminal case, after the caption stating time and place of holding the court, the record should consist of the indictment as found by the grand jury, the arraignment of the accused, his plea, the impaneling of the traverse jury, their verdict, and the judgment of the court. This, in general, is all the record need state. If, during the progress of the prosecution, motions are made and overruled, the facts can be preserved by a special entry on the record, or by bill of exceptions. In one or the other of these ways it is necessary to preserve every fact that the prisoner may deem essential to his rights, and a fair and regular trial."

We believe this to be good law, although the same court seems to have adopted a different rule in *Falk* v. *The People*. According to this rule, instructions do not become a part of the record unless made so by bill of exceptions.

Again, the language of the statute of 1865, respecting exceptions in criminal cases, seems to leave no doubt as to the necessity of an exception upon every point reserved for the consideration of a court of review. That statute is as follows:

"In all cases in the district court where either party shall except to any ruling, decision or opinion of the court, and shall reduce such exception or exceptions to writing, it shall be the duty of the judge to allow the same, and to sign and seal the same. * * * And when such bill of exceptions is so allowed, and signed and sealed by the judge, * * * * it shall thereupon be filed by the clerk, and shall become a part of the record in such cause."

It will be noticed that the statute does not declare that the ruling of the court alone, however certified, shall become part of the record. It is only when such ruling is accompanied by an exception, and is properly certified, that it gains the legal quality necessary to its admission to the record. Bouvier defines an exception to be, "the statement in writing of the objection made by a party in a cause to a decision of the court on a point of law, which, in confirmation of its accuracy, is signed and sealed by the judge or court who made the decision."

From this, it appears that three things are comprised in an exception; the ruling of the court, the objection thereto, and the authentication. The objection of the party appears to be quite as indispensable as either of the other qualities, and we know of no ground upon which it can be said to be unnecessary. It is one of the essential elements of an exception, and the exception cannot exist without it. In *Falk* v. *The People*, the supreme court of Illinois assumes that the record shows the instructions, which is the very point in controversy. How can the record show the instruction when the exception for which the statute calls, and which is the essential condition upon which they are to be entered of record, is wanting? For ourselves, we must continue to say that we cannot thus interpret the law. It is written that exceptions to the rulings of inferior courts shall be

entered of record, and shall be open for review in this court, and we cannot say otherwise, even if we would. What is here said will furnish an answer also to the suggestion, that the instructions being found in the bill of exceptions are the subject of judicial cognizance in this court. We have here the certificate of the judge who tried the cause as to these instructions, but in the absence of any exception to them we are not judicially informed of their character. The modern practice of putting all the exceptions taken throughout the whole course of a cause into a single bill has not changed the rule that each exception stands upon its own merit. The circumstance that a ruling to which no exception has been taken is incorporated in the same bill with another ruling to which an exception has been taken, cannot affect the status of the former. Each must stand or fall by itself. It was also urged that the judge of the district court should have entered exceptions in behalf of the accused, or, at all events, that it ought to be assumed that all exceptions were taken at the proper time. We are acquainted with the ancient maxim, adopted in the days when persons charged with crime were not allowed the assistance of counsel, which declares that a judge shall be counsel for the prisoner, but we doubt whether it has ever been carried so far as to require the judge to object to his own ruling. We may say, with Foster:

"In capital cases the court is so far of counsel with the prisoner that he should not suffer him to consent to any thing manifestly wrong, and to his own prejudice," but this is not saying that the court is bound to object to every thing that is done in the progress of the cause. A proper respect for the maxim would doubtless restrain the judge from misapplying or misinterpreting the law. But if, after stating the law as judge, he should be required as counsel for the accused to state an objection to his ruling, he would appear to be in an exceedingly perplexing situation. One who is bound to lay down the law correctly, and immediately show himself wrong by stating a valid objection to it, is certainly in need of an ingenious mind. If a judge believes a ruling

to be erroneous he ought not to make it, and if he believes it to be correct, he cannot state a valid objection to it. The statute provides that the *party shall except* to the ruling of the court, which is sufficiently explicit and free from ambiguity. There are authorities also which hold strong language upon this point. In *Clem* v. *The Commonwealth*, 2 Metc. (Ky.) 10, which was a capital case we find the following language:

"It is insisted on behalf of the appellant that the circuit court committed errors to his prejudice in admitting important evidence against him. It does not appear from the record, however, that any exceptions were taken to any of the evidence offered by the Commonwealth and permitted to go to the jury, and for this reason, even if it appeared that improper evidence had been admitted upon the trial, the appellant could not avail himself of such error as a ground of reversal."

So also in 1 Bishop's Crim. Law, § 843, it is said: "If the defendant permits illegal testimony to be given to the jury, as shown by his making no objection to it, he cannot afterward claim any privilege on account of its admission." The rule is here stated with reference to testimony, but it is the same in respect to instructions, as we may learn from the case of *Hopkins* v. *Commonwealth*, cited in our opinion in this cause. If a superior court is required to assume that objection has been made to an instruction or to testimony upon a trial in an inferior court, or if a judge upon a trial of a capital cause is bound to interpose an objection when none is made by the prisoner, these authorities are strangely silent upon those points. Upon a careful examination of the opinion drawn up by our brother Gorsline, we are again compelled to express our concurrence therein, and we are constrained to add that we do so under a profound sense of the responsibility resting upon us, as the minister of the law, listening to the last appeal of a wretched man who is about to take his place upon the gallows.

In this connection we will briefly allude to the instructions given upon the trial below for the purpose of freeing

the case from any suspicion of illegality that may be cast upon it. We have not lost sight of the fact that these instructions are not before us in a way which will enable us to pronounce a judicial opinion upon them, but we desire to make some observations for the purpose of showing that the instructions are not, as has been claimed, wholly unsupported by the law. The case of *The People* v. *King*, 27 Cal. 507, was an indictment for murder, and upon the trial in the district court an instruction was given which, as will be seen, was substantially the same as the one of which complaint is made in the case at bar. We give the remarks of the court at length:

"It is next claimed that the court erred in giving the following instruction: 'In the case that is now being submitted to you, there is no evidence on any points or matters given in proof which reduce the crime charged in the indictment to manslaughter; if the defendant be found guilty, therefore, you cannot consider the question of manslaughter upon the evidence in this cause.' This instruction is not a little obscure, and if it was given as represented in the transcript, it is quite possible that the jury may have found some difficulty in determining its exact meaning. The record does not contain the evidence, or any part thereof, and we cannot, therefore, read the instructions in the light of the testimony in view of which it was given, but are forced to determine its meaning by its own terms. If there was any evidence before the jury tending, however slightly, to reduce the homicide to the grade of manslaughter, this instruction was erroneous. If the expression 'there is no evidence on any points or matters given in proof' is to be understood as admitting that there were 'points and matters given in proof' which, if true, would reduce the offense to manslaughter, but declaring the evidence as to such points or matters to be insufficient to warrant the jury in finding them to be true, it was erroneous, because it assumed to pass upon the weight of evidence which, under our constitution, is left entirely to the jury, and in regard to which the judge, contrary to the rule of common law, is not

allowed to express an opinion. On the other hand, if there was a total absence of all testimony as to such facts and circumstances as would, under the law, reduce the offense from murder to manslaughter, and the instruction is to be understood as declaring such to be the case, then it was not erroneous, because judges, although not allowed to charge juries with respect to matters of fact, may state the testimony and declare the law (sec. 17, art. VI of the Constitution). At common law a judge is allowed to express his opinion as to the weight of evidence. *Commonwealth* v. *Child*, 10 Pick. 252. In this respect the constitutional provision referred to was intended to change the rule so as to leave the weight of the evidence entirely to the jury; but judges may still, as formerly, state what facts are in evidence and what are not; or in other words, they may state the evidence *pro* and *con.* in view of which the existence of certain facts is affirmed or denied, which includes the right to state to the jury, that there is no evidence as to particular facts or issues, when such is the case; counsel for defendant seems to have understood the judge as instructing the jury that there was no evidence as to facts, which, under the law, would reduce the offense charged to manslaughter, and to have excepted to the instruction upon that ground, so understood, there being no evidence of the character in question, the instruction was not erroneous."

So, also, in *The People* v. *Byrnes*, 30 Cal. 207, the court say:

"It is neither necessary nor proper for the court, on the trial of an indictment for murder, to give an extended or any definition of murder in the second degree, unless there is evidence in the case tending to prove that the crime was or may have been of that grade in the given instance. Instructions are always to be given with reference to the facts proved before the jury. * * * The circumstance that counsel conducted the defense on the theory of murder in the second degree, assuming that he did so, did not in itself make it necessary that the court should deal with the case in an aspect which it did not in fact present."

The constitution of the State of California, like our statute, restrains courts from charging juries respecting matters of fact, and therefore these decisions are in point. It is true that the constitution of that State expressly declares that the courts may state the testimony, but as our statute is silent upon that point, and courts were always, by the common-law practice, allowed to state the testimony, we may safely affirm that the law is the same in this territory. We learn from these decisions that it is not error to withdraw from the consideration of the jury a crime concerning which there is no evidence before them. Whether there is any evidence at all to prove a fact charged is always a question for the court, but the sufficiency of evidence to prove the facts charged must be determined by the jury. If, in a case of felonious homicide, the evidence shows the killing to have been deliberate and intentional, there is no question of manslaughter presented, and therefore no reason for submitting that question to the jury. To require the jury in such a case to pass upon the question of manslaughter would be as unreasonable and absurd as to instruct them respecting the crime of larceny. So in the case of the *State* v. *Mill*, 3 Nev. 444. The court instructed the jury that they must find the prisoner guilty of murder in the first or second degree or not guilty; thus taking from them the right to find the prisoner guilty of manslaughter, and the supreme court of that State say: "If it was proper, under such a state of facts, to charge the jury they might, in their discretion, find the prisoner guilty of manslaughter, it was equally proper to charge they might find him guilty of an assault to commit murder, or even guilty of a simple assault, for both of these are crimes of which a party under our statute may be convicted upon an indictment for murder; yet in a case where a party was beyond all question slain, and another party indicted for the murder, it would seem ridiculous to charge the jury that they might find the defendant guilty of a simple assault."

We agree, that if the evidence tends to prove a case of

manslaughter, or if, upon the evidence, there is any doubt whatever as to the grade of the crime, the question of manslaughter ought to be submitted to the jury; but when all the evidence tends to prove murder, if it proves any thing, it cannot be wrong to say to the jury that the only question before them is, whether the accused is guilty of that crime. It is true that in the case at bar the question of manslaughter was withdrawn from the consideration of the jury, but there was no evidence whatever tending to establish that crime. To adopt the language used in *The People* v. *Byrnes*: "We consider that all the evidence tended to prove murder * * * * , and it is certain that there is none having the slightest tendency to the contrary."

The evidence in this case shows that the deceased, after being twice knocked down upon the floor of his isolated cabin by the blows of the plaintiff in error, was strangled to death by the latter's companion in the terrible crime. The combat was commenced by the plaintiff in error, so far as we know, without provocation, and after he had reduced his victim to a condition of helplessness, the cause of death was applied by this man and his associate, or by his associate alone. The guilty pair then bore away the body of deceased and threw it into a neighboring mining shaft, and together fled from the scene of the tragedy. According to the statement of one witness, the prisoner protested against the act of Reynolds in tying the rope around the neck of deceased, but if the jury accepted this as true we cannot say that it tended to reduce the crime to manslaughter. The only effect of it would be to deny on the part of the prisoner any participation in the killing. The statute declares, that "in cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury upon the person killing. The killing must be the result of that sudden violent impulse of passion supposed to be irresistible. And again, the killing being proved, the burden of proving cir-

cumstances of mitigation, or to justify or excuse the homicide, will devolve on the accused unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide."

With the law and the evidence in this case before us, we are unable to perceive that there was any question of manslaughter arising in the case. The accused must be guilty of murder if he is guilty of any thing, and we have already said that we entertain no doubt as to his guilt. We deplore the necessity which rests upon us to declare this conclusion and we would gladly avert the dreadful doom of the wretched man, who now invokes our aid, if it were possible to do so, but we have a duty to perform as officers of the law which cannot be controlled by any feeling of sympathy for the prisoner, and it is in the discharge of that duty that we now declare that the petition for rehearing must be denied.

Petition denied.

ARMOR v. FISK.

PLEADING—*performance of condition precedent.* In an action upon contract to pay two sums of money, the first, when a certain suit is defeated; the second, when the title to certain property is perfected, it is necessary to aver and prove performance of these conditions, or to excuse the failure. *But a condition impossible* to be performed need not be noticed, and if, at the date of the contract, no suit was pending as set forth in the contract, the payee could not be required to show that he had defeated such suit, and he may recover the sum payable upon such condition, upon a count for an account stated.

EVIDENCE *of pendency of suit.* Whether a suit was pending as described in the contract at the time therein mentioned, was provable by the records of the court in which it was alleged to be pending.

Appeal from District Court, Gilpin County.

FIRST count in the declaration was *indebitatus assumpsit.*

"For certain quartz lode mining claims, lode claims, gulch claims, quartz mill claims, water mill claims, mill claims, water power, water privilege, flumes, buildings, stamp mills, water mills, tools and machinery, more particularly described as follows, to wit: Mining claims number (1) one, (5) five and the undivided half of number (6) six, on the Fisk lode, east from discovery. Also, claims number (1) one, and (2) two, on the Gregory extension lode, number (1) one being the discovery claim, and running (200) two hundred feet from the upper or north-east end of said discovery claim along said lode south-west to a point below the base of a large rock, and about fourteen feet south-west of a certain shaft sunk on said claim, and known as the shaft of Charles W. Fisk. Also claim number (4) four, on the Simmons lode, adjoining the Black Hawk Mill Company's claim on the south-west end, and running thence south-west along said lode (100) one hundred feet. Also two gulch claims, commencing at or near the road in front of Davenport's saloon, and running down two hundred feet in the direction of the Gregory lode. All of the above-described property lying and being in Gregory mining district, county of Gilpin, and territory of Colorado. Also the mill claims, water power and flumes, situated therein, commencing at a point on North Clear creek below the old toll road gulch and twenty (20) feet below what is generally known as the old Newland Arastra bed, and running from said creek eight hundred and fifty (850) feet. Also all of the quartz mill, with all the tools, machinery and appurtenances of every description and kind thereunto belonging, situate on said water claims, and generally known as the Fisk mill property; and all the buildings and hereditaments on said claims, and situate in Enterprise Mining District, Gilpin county, Colorado territory."

In the second count the property was differently described, but no special agreement was mentioned.

The money counts were added.

The defendant pleaded the general issue, payment and a set-off.

At the trial, Fisk proved a conveyance from himself to Armor of the property mentioned in the declaration, and also gave in evidence the following agreement:

"ARMOR, JOHN
and
FISK, CHAS. W. } Agreement.

"Know all men by these presents, that whereas, heretofore, to wit, on the 20th day of December, A. D. 1862, John Armor, of the county of Gilpin and territory of Colorado, made, executed and delivered to Charles W. Fisk, of the same place, his certain writing obligation (a bond), subscribed with his name and sealed with his seal, by which said bond the said John Armor bound and obligated himself to pay to the said Charles W. Fisk the penal sum of ten thousand dollars ($10,000) in the event that the said Fisk, having performed the conditions imposed on him in said bond, and hereinafter set forth, the said Armor failed to make the said Fisk a good and valid deed to the undivided one-half interest in and to the property described in said bond, being the same that is hereinafter described and set forth; the conditions to be performed by the said Fisk being, that the said Fisk should prosecute successfully against Dan. S. Parmalee, Benjamin Smith and others a certain suit or suits then pending, in which said suit or suits Parmalee, Smith and others claimed a portion of the property hereinafter described, and should, by the 20th day of December, A. D. 1863, legally clear the premises hereinafter described of all persons claiming or occupying the same, so that the said John Armor should have and enjoy the quiet and peaceable possession of all the property hereinafter described, so as to vest absolutely in the said Armor the title to all of said property both at law and in equity. Another condition to be performed by said Fisk was, that said was to pay over to the said John Armor all sums of money which the said Armor should pay, or cause to be paid, on behalf of the said Fisk (over and above the sum of fifty-two hundred dollars [$5,200]) cash in hand, paid

by the said Armor to the said Fisk, in order to obtain a clear title and peaceable possession to any of said property, as well as all other sums of money which the said Armor shall advance to the said Charles W. Fisk, or pay out for the use and benefit of the said Fisk, as well as all indebtedness, by account or otherwise, by which the said Charles W. Fisk may be indebted to the said Armor, together with the interest at the rate of five per cent per month from the date of such indebtedness is created up to the 20th day of December, A. D. 1863; the property alluded to as aforesaid, lying, being and situated in the county of Gilpin and territory of Colorado, to wit: Mining claims No. (1) one, (5) five, and the undivided half claim No. (6) six on the Fisk lode, north-east from the discovery claim; also claims Nos. (1 and 2) one and two, on the Gregory extension lode (No. [1] one being the discovery claim), and running two hundred feet from the upper or north-east end of said discovery claim along said lode south-west to a point below the base of a large rock, and about fourteen feet south-west of a certain shaft sunk on said lode, and known as the shaft of Charles W. Fisk. Also claim No. (4) four on the Simmons lode, adjoining the Black Hawk Mill Company's claims on the south-west end, and running thence south-west along said lode one hundred feet; also two gulch claims, commencing at or near the road in front of Davenport's saloon, and running down two hundred feet in the direction of the Gregory lode; also the mill claim, water power and flume, situate thereon, commencing at a point on North Clear creek, below the old toll road gulch, and twenty feet below what is generally known as the old Newland Arastra bed, and running down said creek eight hundred and fifty feet; also all the quartz mill, with all the tools, machinery and appurtenances of every description and kind thereunto belonging, situated on said water claims, and generally known as the Fisk mill property; and whereas it is the desire of both the said Armor and the said Charles W. Fisk, that said property shall be sold by the said Armor, upon the conditions hereinafter set forth:

"Now, therefore, know all men by these presents, that I, John Armor, for and in consideration of the premises, as well as in consideration of the covenants and agreements of the said Charles W. Fisk, hereinafter set forth, do by these presents covenant and agree, to and with the said Charles W. Fisk, to use my best endeavors to sell the property aforesaid within the space of four months from the date hereof, and upon the sale thereof, to pay over to the said Fisk, as a consideration in full for all the interest he may have in said property, the sum of twenty thousand ($20,000) dollars, less the amount, if any, that the said Fisk may be indebted to the said Armor at that time, provided always that the said Charles W. Fisk shall, on or before that time, have fulfilled all the conditions imposed on him in said bond, and hereinafter set forth; and the aforesaid Charles W. Fisk, for and in consideration of the premises, as well as in consideration of the aforesaid covenants and agreements of the said Armor, doth, by these presents, covenant and agree, to and with the said Armor, that the said Armor may, at all times, within the four months from this date, bargain, sell and convey said property to such person, and for such sum or sums of money as he, said Armor, shall deem fit and proper, and the said Fisk, upon the payment to him by the said Armor of the sum of twenty thousand ($20,000) dollars, less the indebtedness of the said Fisk to the said Armor as aforesaid, hereby relinquishes forever all rights, title and interest, whether at law or in equity, to the property aforesaid, and agrees that the bond aforesaid shall be void and of no effect, and out of twenty thousand dollars to be paid by the said Armor, as aforesaid, the said Fisk hereby agrees that the said Armor may retain all sums of money which the said Armor shall have paid or caused to be paid, on behalf of said Fisk, to obtain a clear title and peaceable possession to any of said property, as well as all other sums of money which the said shall or may have advanced or paid out for the use and benefit of the said Fisk, as well as all indebtedness by bond, note, account or otherwise, by which the said Fisk may be indebted to the

said Armor, together with interest at the rate of five per cent per month on such indebtedness, from the time it was or is credited up to the time such settlement may be made.

"It is also agreed and understood that in the event said sale is not made by said Armor as aforesaid, this agreement is to be considered as canceled and of no effect. As witness our hands hereto subscribed, and our seals hereto affixed this 11th day of November, A. D. 1863.

(Seal.) "JOHN ARMOR.
"CHARLES W. FISK."

This agreement bore a certificate of acknowledgment from a notary public.

The plaintiff below also introduced a written instrument, as follows:

"BLACK HAWK, Colorado, *April* 5, 1864.

"I promise to pay to Charles W. Fisk two thousand eight hundred and twenty dollars, and also pay two thousand one hundred and eighty dollars, the amount of a note given by Charles W. Fisk to one John Shumer, about March 10th, 1864, being amount of principal and interest due on said note when the same shall become due, provided the said C. W. Fisk shall successfully defend a suit now pending in the district court of Gilpin county, wherein Benjamin F. Smith and Dan. S. Parmalee are plaintiffs, and Chas. W. Fisk is defendant, and shall obtain a writ of restitution from said court and be put in possession of a certain shaft on the Gregory extension lode (about the possession of which the suit is pending), and generally known as the shaft of said Fisk, and I also agree to pay all costs that may accrue upon said suit, or upon any suit for title to said property after the April term of said district court, leaving a balance due to C. W. Fisk on property John Armor purchased by me from him of five thousand dollars after the amounts mentioned above are paid; said five thousand dollars ($5,000) to be paid when the title to said property is all cleared, as mentioned in a certain bond from said Armor to

said Fisk, bearing date about December 20th, 1862, and also a certain agreement between said Armor and said Fisk, bearing date November 11th, A. D. 1863, and on record.

"JOHN ARMOR."

The defendant below introduced a written instrument, as follows:

"Received, Black Hawk, Colorado, April 5th, 1864, of John Armor, ten thousand dollars ($10,000) in part payment for my interest in certain property in Gilpin county, Colorado territory, which I agreed with said Armor, on November 11th, A. D. 1863, that he should sell, and for which interest I was to receive twenty thousand dollars ($20,000) as payment in full as per said agreement. I have also received of said Armor his obligation to pay me two thousand eight hundred and twenty dollars ($2,820) when I shall obtain a writ of restitution from the district court of Gilpin county to the possession of certain property on the Gregory extension lode, more fully described in said obligation and in the agreement above referred to; and I have also received from the said Armor his obligation to pay a certain note given by me to John Shumer about March 10th, 1864, for two thousand dollars, due in three months from date, with interest at the rate of three per cent per month, upon which note said Armor is security. Now, if the said Armor shall pay the sum of two thousand eight hundred and twenty dollars ($2,820), above specified, and also the amount of the note to Shumer when the same shall become due, which would be, in principal and interest, $2,180, then there would be due to me, as balance in full of the twenty thousand dollars ($20,000) above spoken of, five thousand dollars ($5,000), to be paid according to the conditions of a certain bond given me by said Armor, December 20th, 1862, and also the conditions of a certain agreement made between said Armor and myself, on November 11th, 1863.

"CHAS. W. FISK."

There was a large amount of evidence not referred to in the opinion of the court, and therefore it is not inserted here.

The cause was tried to the court without a jury, and judgment for the plaintiff for $3,337, and costs.

Messrs. ROYLE & BUTLER, for appellant.

Mr. JOHN W. REMINE and Mr. E. T. WELLS, for appellee.

HALLETT, C. J. In the investigation of this case we have not found it necessary to consider all the objections to the record made by the appellant. The rights of the parties are established by the two papers of date April 5, 1864, and the agreement of November 11, 1863, to which reference is made in those papers, and we shall confine the discussion to those instruments. We learn from the agreement of November 11, 1863, that the appellee was jointly interested with the appellant in certain property described therein, which the latter held by deed from the former; if the appellant should sell the property he covenanted to pay to the appellee $20,000, less any indebtedness of the appellee to him, and upon the condition that the appellee should successfully prosecute a certain suit or suits in which the property was involved, and "legally clear the premises hereinafter described of all persons claiming or occupying the same, so that the said John Armor should have and enjoy the quiet and peaceable possession of all the property hereinafter described, so as to vest absolutely in the said Armor the title to all of said property, both at law and in equity."

By the writings of April 5, 1864, it appears that the sale referred to in the agreement had been effected, and the agreement was modified in some important particulars. The appellee then acknowledged that he had received $10,000 of the $20,000 mentioned in the agreement, and the balance of $10,000 was divided into two equal parts, and separate conditions attached to each of the parts. First, the sum of $5,000 was payable "provided the said C. W. Fisk shall

successfully defend a suit now pending in the district court of Gilpin county wherein Benjamin F. Smith and Dan. S. Parmalee are plaintiffs and Chas. W. Fisk is defendant, and shall obtain a writ of restitution from said court and be put in possession of a certain shaft on the Gregory extension lode (about the possession of which the suit is pending), and generally known as the shaft of said Fisk."

Second, the sum of $5,000 was payable "when the title to said property is all cleared, as mentioned in a certain bond from said Armor to said Fisk, bearing date about December 20, 1862, and also in a certain agreement between said Armor and said Fisk, bearing date November 11, 1863, and on record."

Appellant claims that this last clause is changed so as to include all the conditions specified in the agreement by the paper of April 5, 1864, signed by the appellee. It is true that this writing of the appellee states that the last $5,000 is payable upon the conditions of the bond and agreement, and this standing alone would of course include all of those conditions, but the paper given by appellant mentions only the title to the property, and as he was the party upon whom the obligation to pay was placed, we may presume that he selected his language with care.

Again, the condition respecting the Smith and Parmalee suit, mentioned in the agreement, was made applicable to the first $5,000 by the writings of April 5, and if the same condition was to be applied to the second sum of $5,000 the purpose of dividing the sum of $10,000 into two parts, as was done by those writings, is not apparent. It would seem, also, that the indebtedness and advances which occupied so large a space in the agreement of 1863, and was evidently the subject of much anxiety on the part of the appellant, had been extinguished before the writings of April 5 were drawn. The appellant makes no mention of it in the obligation signed by him, but he obliges himself to pay costs which should thereafter accrue in defending or securing the title to the property. This obligation to pay costs is not at all consistent with the notion that advances

previously made were yet in arrear. It is plain that the first $5,000 was payable upon the successful issue of the Smith and Parmalee suit, and the second upon perfecting the title to the property in the appellant, and securing to him the possession thereof. The appellant, having doubts as to the soundness of the title to the property, retained $10,000 of the purchase-money to secure himself against eventual loss. As the issue of the Smith and Parmalee suit, if favorable to the appellee, would in some measure demonstrate his right to the property, the appellant was willing to pay one-half the amount upon the successful termination of that controversy; the remaining one-half of the $10,000 was to abide the result of a more comprehensive scrutiny of the title, with a view to supply defects therein if any should be found. Now here were acts to be done by the appellee before he could call upon the appellant for payment, and if it were possible to perform these acts, the appellee should have averred in his declaration and proved upon the trial performance, or an excuse for the non-performance of them. In *Campbell* v. *Jones*, 6 Term R. 570, Lord Kenyon says: "If one thing is to be done by a plaintiff, before his right of action accrues on the defendant's covenant, it should be averred in the declaration that that thing was done."

So, also, in 1 Chitty's Pl. 321, we find the doctrine laid down as follows:

"But when the consideration of the defendant's contract was executory, or his performance was to depend upon some act to be done or forborne by the plaintiff, or on some other event, the plaintiff must aver the fulfillment of such condition precedent, whether it were in the affirmative or negative, or to be performed or observed by him or by the defendant, or by any other person, or must show some excuse for the non-performance."

In the declaration in this cause we find only the common counts, and of course there is no averment of performance, or of excuse for the non-performance of the conditions precedent, mentioned in the writings of April 5, 1864, and

this upon the supposition that there is no inherent impossibility in performing those conditions is decisive of the question respecting their admissibility as evidence under the declaration. Our attention has been called to that numerous class of cases where, upon sale of goods, or performance of labor under special contract, the plaintiff, although unable to comply strictly with his contract, and therefore unable to support a special count upon it, has, nevertheless, been allowed to recover the value of his goods or services under common counts, and an attempt has been made to show that this case may stand upon the doctrine of those cases.

If the appellee had contracted to sell property to the appellant, and had conveyed the property, but not in the time or manner specified in his contract, and the appellant had accepted the property, the analogy between those cases and this case would be easily traced, and we should have no difficulty in applying the rule laid down in those cases. But the present is not like those cases. Here was property sold, and part of the purchase-money paid, the vendee, with the consent of the vendor, withholding the balance of the purchase-money until the title to the property should be established, which is a payment to be made upon condition and not the substantial performance of a contract. We conclude, therefore, that the writings of April 5, 1864, were not admissible under any count in the declaration, unless, indeed, the conditions mentioned in those writings were impossible of performance. As to the second of those conditions respecting the title, we cannot perceive any inherent impossibility in regard to its fulfillment, nor has any such impossibility been suggested. As to the first of those conditions respecting the Smith and Parmalee suit, it is said that there was no such suit pending in the district court of Gilpin county, at the date April 5, 1864, and if that fact appeared, it seems to us the condition would be impossible. If no suit existed, certainly the appellee could not resist successfully, nor could he obtain a writ of restitution therein. If the appellee had contracted to procure

Smith and Parmalee to institute a suit against him in the district court of Gilpin county, and to defeat the suit thus instituted, he would be held to his contract. But here the undertaking is to defeat a certain suit pending in a certain court, and if there is no suit pending in that court, it is like the case given in the books, of one who should contract to go to Rome in a day, inherently impossible to be performed.

In *Worsley* v. *Wood*, 6 Term R. 718, Lord Kenyon declares that, "If there be a condition precedent to do an impossible thing, the obligation becomes single."

And the same doctrine is found in Bacon's Abridgment, title Condition N. Under this rule, if the condition respecting the Smith and Parmalee suit was impossible, the first $5,000, mentioned in the writings of April 5, was payable unconditionally and presently after the making of the instrument. In the words of Lord Kenyon, the obligation was single, and there was no condition to be performed or excused and no necessity for any averment of performance or of excuse for the non-performance. The sum of money, being payable absolutely, might be recovered upon a count for an account stated. However, we find in the record no evidence tending to show the non-existence of the Smith and Parmalee suit, and for the want of such evidence the judgment must be reversed. The fact, if it exists, was provable by the records of the court of the date April 5, 1864, and those records, or a copy thereof, should have been introduced. *Pitcher* v. *King*, 1 Carr & Kir. 655 (47 E. C. L. R. 655); 1 Greenl. Ev., § 507. It is not necessary to consider further the admissibility of the evidence given in the court below, nor is it necessary to express any opinion as to the weight of the evidence. In conclusion, we desire to express our satisfaction with the manner in which this case was prepared for hearing in this court. The abstracts, prepared by counsel for appellant, present the parts of the record to which the attention of the court is directed in a full and perspicuous manner, and thereby the labors of the court have been very much lightened. The duty of preparing abstracts of the record in this court is usually so imperfectly performed,

that the abstracts are of no service whatever to the members of the court. We hope that the commendable practice inaugurated by the counsel for appellant may be very generally observed.

The judgment of the district court is reversed and the cause is remanded for further proceedings.

Reversed.

BOARD OF COUNTY COMMISSIONERS OF ARAPAHOE CO. v. KOONS et al.

CONSTRUCTION OF STATUTE — *meaning of the word "stationery."* Blanks used by a clerk of a district court are not stationery within the meaning of section 28, chapter 21, Revised Statutes, and the county is not liable for them.

Error to District Court, Arapahoe County.

THE statute (Rev. Stat. 172), so far as it relates to the subject considered, is as follows:

"SEC. 28. The board of commissioners of their respective counties shall, at the expense of the county, * * * * provide suitable books and stationery for the use of each of the county officers of their county."

Mr. Justice EYSTER dissented.

Mr. V. D. MARKHAM, for plaintiff in error.

Mr. G. W. MILLER and Mr. S. E. BROWNE, for defendants in error.

GORSLINE, J. This case comes before us on an agreed statement of facts, and the only question to be determined is, whether the county is liable for blanks furnished to the clerk of the district court to be used in his office. The statute provides, that the several boards of county commissioners shall provide suitable books and stationery for the use of the county officers of their county. If these blanks,

used by the clerk of the district court, come within the definition and meaning of "stationery," then the judgment of the district court should be affirmed. Stationery is defined to be such articles as are usually sold by stationers, as paper, ink, quills and the like. We might go further and say that such blanks as are used by the public generally, as blank deeds, mortgages and the like, could well be included in the meaning of the term. It must be different, however, as to those blanks which are intended for and used only by one person in the county, for they are valueless to all others. Such blanks are not *usually* kept by stationers, for the public have no use for them. They are printed solely for the use of one person, and the public has no use for or interest in them. It is, doubtless, convenient, and facilitates business, for the clerk to have these blanks, but the question is, whether the law has provided that the county shall pay for them. We think it has not, and, therefore, that the judgment of the district court should be reversed. We are aware that the question has been decided differently by the supreme court of Illinois (*County of Knox* v. *Arms*, 22 Ill. 175), but we fail to see the force of the argument advanced by that court, unless the long practice of the court in auditing such bills of its clerks had sanctioned the construction which the court gave to the statute.

The judgment of the district court is reversed.

Reversed.

HOEHNE *v.* TRUGILLO.

1 161
2 387
3 532

1 161
36 230

RECORDS OF PROBATE COURTS. A mere minute or memorandum of a proceeding is not a record.

An entry in the following form: "Judgment given by default by order of the court," is not a judgment.

JUDGMENT — *what shall be regarded as final.* Where the court below has awarded execution, this court will entertain a writ of error to reverse the judgment, although the record of such judgment is defective.

JUDGMENT — *defective in form.* There may be error in the form or substance of a judgment, as well as in the proceedings preliminary to it.

Error to Probate Court, Las Animas County.

Mr. W. F. STONE, for plaintiff in error.

Mr. G. W. PURKINS, for defendant in error.

HALLETT, C. J. The transcript of the record filed in this court contains informal memoranda of the proceedings of the probate court in the manner usually adopted by justices of the peace, together with copies of papers filed in that court. It is not in the form used by courts of record, and, indeed, is so unlike a record that it is difficult to apply that name to it. The statute gives to probate courts the character of courts of record, and declares that they shall be governed by the rules of practice and proceeding prescribed by law for district courts. In the words of Mr. Justice BLACKSTONE, "A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony; which rolls are called the record of the court, and are of such high and super-eminent authority that their truth is not to be called in question."

In these days the parchment is discarded, but records still retain their character as a judicial memorial of "high and super-eminent authority." The importance of uniformity and perspicuity in the language of records was early appreciated, and great care was taken in selecting it. It is to be regretted that the same care has not always been observed, and that the familiar forms which have been sanctioned by long usage should be disregarded. The law overlooks many mistakes, omissions and ambiguities in records, when they do not affect the sense of the matter recorded, but we are not prepared to say that the approved forms in which the orders and judgments of courts are usually entered may be entirely ignored. A mere minute or memorandum of a proceeding is not a record. *Leveringe* v. *Dayton*, 4 Wash. C. C. 698.

And we have nothing more than memoranda in this transcript. For instance, the entry which is said to be a judg-

ment is as follows: "Judgment given by default by order of the court," following which is a statement that the plaintiff below filed a note of a certain amount.

There is no statement that any sum of money was recovered by one party from the other, or that any thing was considered or adjudged by the court, or indeed any thing that is essential to a judgment. And yet it seems that execution was issued out of the probate court against the property of the plaintiff in error to collect the amount for which this entry is supposed to stand as a judgment. And here we approach the consideration of the motion to dismiss the writ of error for want of a sufficient record. The rule which limits the appellate jurisdiction of this court to cases in which final judgment has been rendered is supposed to apply to this case, inasmuch as no judgment appears in the transcript, and yet, if we dismiss the writ, there appears to be nothing to prevent the defendant in error from obtaining another execution out of the probate court; in our judgment the rule referred to does not apply to cases of this kind, for the reason that the court of original jurisdiction has decided that final judgment has been rendered. It is true that we do not find any such opinion in express terms, but execution has been awarded by that court, which cannot be done except upon final judgment. There would be great hardship in denying to one whose property has been taken in execution the right to test the validity of the judgment upon which the execution issued. If the judgment is defective or void, that is the very fact which he wishes to establish in a court of errors in order to prevent his adversary from selling his property under it. There may be error in the form or substance of a judgment as well as in the proceedings preliminary to the judgment. *Martin* v. *Barnhardt*, 39 Ill. 12. The motion to dismiss must be denied, and from what we have said of the record it will be apparent that the judgment, such as it is, must be set aside and the cause remanded with directions to the probate court to permit the plaintiff in error to plead to the action. Even if the judgment was perfect in form, there is no record

preliminary to it, upon which it could stand. In the present condition of the probate courts we trust that counsel in this and other cases before those courts will make some effort to conform the records to the rules of practice by which such records are to be tested. The question respecting the right to change of venue will probably receive the attention of the legislative assembly at an early day, and therefore we think it not necessary to consider it.

The judgment is reversed with costs, and the cause remanded.

Reversed.

---

1 164
4 237
1 164
25 504

KURTZE *v.* MCCORD.

JURISDICTION *of probate court to try appeals.* One who appeals from the judgment of a justice of the peace to a probate court, and goes to trial in the latter court without objection, cannot question its appellate jurisdiction.

TRIAL — *before the court.* If neither party demand a jury, a probate court may try an issue of fact without a jury.

Error to Probate Court, Jefferson County.

HALLETT, C. J., did not sit in this case.

Messrs. BROWNE & MECHLING, for plaintiff.

MR. ALFRED SAYRE, for defendant.

GORSLINE, J. The defendant in error, John N. McCord, sued the plaintiff in error before a justice of the peace, and on the 3d day of April, 1865, recovered the sum of $49.50 damages, and costs taxed at $33.60. The defendant below then appealed to the probate court of Jefferson county, and filed his appeal bond. The appeal was tried at the June term of the probate court, and the defendant in error recovered a judgment for the sum of $125.90 and costs of suit, to reverse which judgment this writ of error is brought. The principal errors assigned are, that the probate court had no appellate jurisdiction from justices of the peace, and that

the probate judge assessed the damages without the intervention of a jury. We think it unnecessary to discuss the question whether the law conferring appellate jurisdiction upon the probate courts has been repealed or not, for in this case the plaintiff in error not only submitted himself to the jurisdiction of the probate court, but by taking the appeal *thrust* himself into the jurisdiction. It cannot be, nor is it denied, but that the probate court had jurisdiction of the subject-matter, and by the parties voluntarily appearing and going to trial they waived all objections as to jurisdiction of the parties. *County of Randolph* v. *Ralls*, 18 Ill. 29. The cases referred to in the brief of the plaintiff in error are a class of cases where the court had no jurisdiction of the subject-matter, and are therefore unlike the one at bar. As to the other error assigned and above referred to, we fail to see upon what ground it is based. The statutes cited refer to cases where a default has been taken, and the cause is referred in some cases to the clerk, and in others to a jury to assess the damages. No such state of facts exist here, for the record shows that both parties appeared, and the cause was tried by the probate judge, as by law he could properly, neither party having demanded a jury. It was not an assessment of damages, but a trial of the merits on an issue made. There were some other errors assigned which were not argued, and which we suspect are not relied upon.

The judgment of the probate court is affirmed, with costs.

Affirmed.

GOOD v. MARTIN.

1	165
2	218
2	220
3	139
7	208
1	165
19	94
1	165
14a	247

PROMISSORY NOTE—*party indorsing at the time it is made, may become maker.* If a party put his name on the back of a note at the time it is made, as surety for the maker and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note.

BURDEN OF PROOF—*as to when note was indorsed. Prima facie.* One whose name is upon the back of a note is to be regarded as an indorser, and if

the plaintiff would charge him as maker, the burden of proof is upon him to show that the party to be charged signed his name at the time the note was made, as surety for the maker and for his accommodation, or that the indorser participated in the consideration. Where there was no express agreement between the parties, and the indorser did not participate in the consideration, and it does not appear that he wrote his name on the back of the note before it came to the hands of the payee, the evidence is not sufficient to sustain the verdict.

In order to charge the indorser of the note as maker, it was necessary to show specifically that he put his name upon the back of the note before it was delivered to the payee.

PRESUMPTION *arising from indorsement at time note is made.* If one put his name on the back of a note at the time it is made and make no statement of his intention in so doing, he is presumed to have done so as the surety of the maker and for his accommodation, and to give him credit with the payee.

WITNESS — *competency of payee, in action against indorser, as maker.* In an action by the assignee of a note against one whose name appears on the back of the note, charging him as maker, the payee of the note is a competent witness.

PRACTICE — *pleadings not to be given to the jury.* It is not good practice to allow the jury to take the declaration to their room when they retire to consider of their verdict.

Appeal from District Court, Arapahoe County.

Mr. Justice GORSLINE did not participate in the decision of this cause.

Messrs. J. BRIGHT SMITH & E. L. SMITH, for appellant.

Mr. S. E. BROWNE, for appellee.

HALLETT, C. J. The principal question presented in this record has been the subject of much judicial discussion in the courts of this country, resulting in a difference of opinion, which is exceedingly perplexing. All the courts agree that a liability is incurred by one who, being a stranger to a note, puts his name upon the back of it at the time it is made; but whether he should be regarded as maker, guarantor or indorser, is the point of difference. 2 Parsons' Notes and Bills, 119.

This difference of opinion arises only in cases in which the parties have omitted to express their contract, and have

left it to the law to imply a contract upon the naked signature appearing upon the back of the note. Because the signature is upon the back of the note, it is difficult to say that the party intended to become a maker, and because the signature was put upon the note at its inception, and before it gained the legal quality imparted to it by delivery, it is difficult to say that the party intended to assume the liability of indorser only.

We are glad to find that we have been relieved of the labor of deducing a rule from the mass of conflicting authority upon this point by the court which has revisory jurisdiction of our proceedings. The case of *Rey et al.* v. *Simpson*, 22 How. 341, was an action upon a promissory note against three parties, two of whom had indorsed the note at its inception, and the point under consideration was fully presented and passed upon by the court. "When a promissory note, made payable to a particular person or order, as in this case, is first indorsed by a third person, such third person is held to be an original promisor, guarantor or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. If he put his name on the back of the note at the time it was made, as surety for the maker and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note. On the other hand, if his indorsement is subsequent to the making of the note, and he puts his name there at the request of the maker, pursuant to a contract with the payee for further indulgence or forbearance, he can only be held as a guarantor. But, if the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would be liable then only as a second indorser in the commercial sense, and, as such, would be clearly entitled to the privileges which belong to such indorsers."

And again, "They placed their names there at the incep-

tion of the note, not as a collateral undertaking, but as joint promisors with the maker, and are as much affected by the consideration paid by the plaintiff and as clearly liable in the character of original promisors as they would have been if they had signed their names under the name of the other defendant upon the inside of the instrument."

This is, undoubtedly, the law of this territory and of every other territory of the United States, notwithstanding a different rule may have been adopted in some of the States.

We learn from this case that, in order to charge one, whose name is upon the back of a note, as maker, it must appear that the name was placed upon the back of the note at its inception, and that parol evidence is admissible for the purpose of showing the circumstances attending the signing. *Prima facie*, one whose name is upon the back of a note is to be regarded as an indorser, and if the plaintiff, in an action upon the note, would charge him as maker, the burden of proof is upon him to show that the party to be charged signed his name at the time the note was made, in the language of *Rey* v. *Simpson*, "as surety for the maker and for his accommodation, to give him credit with the payee, or that he participated in the consideration for which the note was given." If there is evidence of an express agreement between the parties, of course that will control, but if the plaintiff relies upon the mere act of signing the note upon the back, unaccompanied by any agreement or declaration of intention, then it becomes important to know precisely when the signing took place.

The authorities are explicit upon the point that the signature must be attached at the time the note is made, in order to affect the signor with the liability of maker, by which we understand that the act must be done while the note is *in fieri*, yet in the hands of the maker, and before it has come to the hands of the payee.

If one put his name upon the back of a note while it is in the hands of the maker, from this act alone it may be presumed that he did so with intent to serve the maker by

becoming surety for him; but if he put his name upon the back of the same note after it has passed into the hands of the payee, we cannot determine from this act alone whether he intended to serve the maker or the payee. Upon looking into the evidence in this cause, we do not find any thing tending to show an express agreement on the part of the appellant with any of the parties, nor does it appear that he shared in the consideration of the note. It seems that the appellee relied upon evidence tending to prove that appellant wrote his name upon the back of the note at its inception. The only witness called (Davidson, the payee of the note), testified that Cheney, Shepard, appellant and himself were present at the making of the note, and that the names were all on it, including, as we understand him, his own, at the time he delivered it to the appellee. We are not informed whether the appellant signed his name upon the back of the note before or after it came into the hands of Davidson, the payee, and, as we have seen, this is material. All the original parties to the note were present at the making of it, and for aught that appears the note may have been delivered to Davidson, and accepted by him, before the appellant became a party to it. If such were the fact, the work of creation was complete when it was delivered to the payee, and no one could become a maker by subsequently indorsing it in blank. It is true that the witness testifies that he would not deliver certain money until the appellant had indorsed a pre-existing note, but who were the parties to that note, and whether the note upon which the action was brought was given in renewal of the other, he does not state. We do not see that the testimony respecting the money is connected with the note here in suit. It is true, also, that he testifies that he cautioned the appellant against putting his name on the note, which shows that the appellant did not sign upon his request, but he also testifies that he was but the nominal payee, his name being inserted by mistake for that of the appellee. If the note was in the hands of Davidson at the time of the indorsement by appellant, the latter may have acted upon

the request of the appellee, or he may reasonably have believed that he was to stand between the payee and the appellee as second indorser. But, if he signed after the note was delivered to Davidson, a better reason for withholding from him the character of maker, is found in the fact that at the time he signed, the contract was fully completed, and it cannot be said that he participated in making it, or that the act of signing stands upon the consideration of the note. We hold that, in order to charge the appellant as maker of the note, it was necessary to show specifically that he put his name upon the back before it was delivered to the payee, and if this appear to be a rigid application of the rules laid down in *Rey* v. *Simpson*, we say as was said in *Clapp* v. *Rice*, 13 Gray, 403, that the doctrine which holds a party who has put his name upon the back of a note liable as maker, is somewhat anomalous, and is not to be extended beyond adjudged cases.

The counsel for appellant insists that, in testifying that he had no interest in the note, and that his name was inserted as payee by mistake, Davidson negatived the condition prescribed in the rule given by the supreme court, to the effect that appellant must have signed for the purpose of giving the makers, Cheney and Shephard, credit with the payee Davidson. As to this it is to be observed that the language of the supreme court is used for the purpose of indicating the possible motives which may have operated upon the mind of the party at the time he put his signature upon the back of the note, and is a statement of the presumption of the law rather than the subject of proof. If one put his name on the back of a note at the time it is made and make no statement of his intention in so doing, he is presumed to have done so as the surety of the maker and for his accommodation, and to give him credit with the payee. If it be said that this presumption is rebutted by the testimony of Davidson, it may be answered that his name was inserted as payee by mistake, the party who was beneficially interested being the appellee. If the appellant signed for the purpose of giving Cheney and Shephard credit with the

appellee, and his name was omitted from the note by mistake, Davidson being inserted in its stead, it will not be contended that the want of interest on the part of the latter would relieve the appellant of liability. Objection was made to the competency of Davidson as a witness, upon the ground that he as first indorser was liable to appellant as second indorser. As a recovery must be had against appellant as maker of the note, if at all, in this action we fail to perceive the force of the objection. Upon the point that the jury were allowed to take the declaration with them to their jury room, we think it necessary at this time only to say that it is a practice not to be sanctioned. The pleadings in a cause are for the consideration of the parties and the court and not for the jury. The court below should have granted a new trial because of the insufficiency of the evidence to charge the appellant as maker of the note and for this cause the judgment is reversed and the cause remanded for a new trial.

Reversed.

HAX et al. v. LEIS.

1 171
18 514

PRACTICE— *computation of time.* In computing the time allowed by the district court for filing an appeal bond, the day on which the order was made is to be excluded.

Appeal bond must be filed within the time allowed by the district court.

Appeal from District Court, Arapahoe County.

Mr. G. W. PURKINS, for appellants.

Mr. S. E. BROWNE, for appellee.

GORSLINE, J. This is a motion by the appellee to dismiss the appeal for the reason that the appeal bond was not filed within the time limited by the district court. The order was made on the 18th day of December, that the bond

should be filed within thirty days. The bond was filed on the 18th day of January following. The rule in the computation of time is, that one day shall be included and one excluded, and the day on which an order is made, as in this case, is the one to be excluded. In computing the time by this rule, the thirty days expired on the 17th day of January, and the bond was therefore filed too late. The appeal must be dismissed with costs.

Dismissed.

---

1 172
3 25
1 178
14 419

CRARY *v.* BARBER.

SERVICE OF PROCESS *must be shown by the record.* The record must show that the defendant was duly notified of the proceedings against him, or that he appeared in the district court.

SERVICE OF ATTACHMENT — *how made.* The statute regulating the service of writs of attachment requires the sheriff to read the writ to the defendant named therein, or to deliver to him a true copy thereof, and personal service cannot be obtained except in one of these ways.

In serving a writ of attachment a sheriff cannot substitute his own language for that of the writ, or cull from the writ such facts as he believes to be material for the information of the defendant, but the language of the writ must be used.

A return to a writ of attachment — That the name of the plaintiff, the amount claimed, and when and where the defendant was to answer the complaint of the plaintiff was read to the defendant, is not sufficient.

NOTICE BY PUBLICATION — *what is sufficient.* Where the statute requires that notice of the pendency of an attachment suit shall be published in a newspaper for four weeks, it is not sufficient to publish such notice for twenty days.

APPEARANCE *for the purpose of objecting to the service of process.* If a defendant file written objections to the manner of serving process and limit his appearance to the purpose of the motion, this is not a general appearance in the cause.

APPEARANCE — *what amounts to.* An order of court which sets out that the parties came by their attorneys, and on plaintiff's motion leave was granted to amend the sheriff's return and the declaration and the cause was continued, does not show a general appearance in the cause by the defendant.

Error to District Court, Gilpin County.

Mr. Justice GORSLINE did not participate in the decision.

Mr. E. T. WELLS, for plaintiff in error.

Messrs. JOHNSON & TELLER, for defendants in error.

HALLET, C. J. The motion to dismiss the writ of error has not been argued, and, perceiving no reason for allowing it, we proceed at once to consider the errors assigned. The plaintiff in error claims that he was not served with process or otherwise legally notified of the pendency of suit in the court below. If this is true, the judgment must be reversed, inasmuch as a court has not authority to render judgment without notice to the party to be charged thereby. Nor can we indulge in a presumption that the plaintiff in error was duly notified of the proceedings against him, or that he appeared in the district court in the absence of record evidence of that fact. *Rany et al.* v. *The Governor*, 4 Blackf. 2; *Anderson* v. *Brown*, 9 Mo. 638.

There were several writs issued out of the district court, all of which were returned *non inventus* as to the defendant named therein except one, to which the sheriff returned, that the defendant had accepted service and subsequently modified his return as follows: "I do further return that the service made on said defendant, Beebe D. Crary, was made by reading to said Beebe D. Crary the name of the plaintiff in said writ and the amount claimed, and when and where the said defendant was to answer the complaint of the plaintiff."

The statute regulating the service of writs of attachment requires the sheriff to read the writ to the defendant named therein, or to deliver to him a true copy thereof, and it is not contended that personal service can be obtained except in one of these ways. It is said, however, that the sheriff complied with the statute substantially by reading to the plaintiff in error the material facts contained in the writ, but we cannot agree to this. The sheriff said nothing to the plaintiff in error of the ground upon which the attachment issued, the filing of the affidavit and bond and other facts set forth in the writ. But if the contents of the writ had

been fully stated to the plaintiff in error, the language of the writ must have been used or the service would not be effectual. The law prescribes the form of the writ, and commands the sheriff to read it, or furnish a copy of it, and this duty must be faithfully performed. We cannot permit a sheriff to substitute his own language for that of the writ, or to cull from the writ such facts as he believes to be material for the information of the defendant named therein and communicate them to him. The law provides for communicating to the defendant in the writ the language of the writ and the whole of it, trusting to his intelligence to comprehend its meaning, and without this there is no service. The principle upon which this point must be decided has been frequently recognized by the courts, and we do not think it necessary to discuss it at length. *Maher* v. *Bull*, 26 Ill. 348; *Chickering* v. *Failes*, id. 519; *Halsey* v. *Hurd et al.*, 6 McLean, 14.

A notice of the pendency of the suit was published in a newspaper for twenty days, but as the statute requires such notices to be published for four weeks, it was not claimed upon the argument that such publication was in any way effectual.

The transcript of the record contains a motion filed in the district court by the plaintiff in error, which probably ought not to be noticed, since it has not been preserved in the record by bill of exceptions or otherwise. *Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wal. (U. S.) 592; *McDonald* v. *Arnout*, 14 Ill. 58; *Douglas* v. *Park et al.*, 43 id. 146.

If, however, it is claimed that we have cognizance of it, we do not perceive that by filing written objections to the manner of serving the process, the plaintiff in error entered his appearance to the action, especially as he limited his appearance to the purpose of the motion. *Malcolm* v. *Rogers*, 1 Cow. 1; *Nye* v. *Liscomb*, 21 Pick. 263.

There is an entry in the record as follows:

"This day came the said parties by their attorneys, and on motion of plaintiff, it is considered by the court that the sheriff have leave to amend his return on the writ in this

cause, and that said plaintiff have leave to amend his declaration, and that this cause stand continued to the next term of this court."

The question is presented whether such an appearance by the plaintiff in error is shown in this order, as warranted the court in entering judgment against him. It seems that the several orders, here incorporated in one, were made at the instance of the defendant in error. The plaintiff in error, although present at the time the order was entered, asked no relief, but remained a silent spectator of the proceedings. We may say that he assented to what was done upon the motion of the plaintiff below, to wit: the amendment of the declaration and the sheriff's return, and the continuance of the cause; but is there any thing in this showing an intention to submit himself to the jurisdiction of the court? We think not. For aught that appears, he may have intended to object to the regularity of the proceedings, if his adversary should take action prejudicial to him. There is nothing to show his intention, and if we are left to conjecture his object in going there, it is quite as reasonable to suppose that he was there for the purpose of objecting to the insufficient return of the sheriff, as for any other purpose. We do not doubt that a party may submit his person to the jurisdiction of a court, and thus bring himself completely within its power. But such submission is not effected by entering the court room merely and witnessing the proceedings of the court. It may be effected by engaging in the controversy with his adversary, opposing him in the forum with the weapons known to the law, but not by unresisting silence and acquiescence merely. We are aware, that it has been held, that an appearance for the purpose of making a motion will be regarded as a full appearance to the action, unless the mover limits his appearance to the purpose for which he is then in court. It will be seen that such cases are distinguishable from this, inasmuch as in those cases the parties who were held to have entered an appearance were participating in the proceedings and invoking the aid of the court, while here the plaintiff in error asked nothing and

did nothing. If one enter the field as a combatant, we may fairly conclude that he was duly notified of the conflict, and fully prepared for it when he came upon the ground. If he stand by calmly awaiting the attack of his adversary, no such conclusion is deducible from his conduct. The voluntary appearance of a party to an action is undoubtedly sufficient to enable a court to proceed to judgment against him according to its recognized methods, but in every case the fact of such appearance ought to be clearly established. The right of every defendant to his day in court is inviolable, and in every case it ought clearly to appear that he has enjoyed it. We find in this record nothing to show that the plaintiff in error was served with process, or that he entered an appearance to the action in the district court, and therefore the judgment of that court is reversed, with costs, and this cause is remanded for further proceedings.

Reversed.

SMITH v. SALOMON.

SURVIVOR — *may sue alone upon joint demand.* The right of a survivor to sue without joining with the representative of his deceased co-obligee is not limited to cases of partnership.

ACTION — *causes of that may be joined.* Demands due to a plaintiff in his own right and as survivor of another, may be joined.

DEMURRER *too large.* Whether a demurrer is general or special, if it go to the whole declaration and there be one good count, it must be overruled.

Error to Probate Court, Arapahoe County.

Mr. Justice GORSLINE did not participate in the decision of this cause.

Messrs. S. E. BROWNE, ALFRED SAYRE & E. L. SMITH, for plaintiff in error.

Messrs. CHARLES & ELBERT, for defendant in error.

HALLETT, C. J. In three counts of his declaration the plaintiff in error set out causes of action which accrued to himself and Crocker in the life-time of Crocker, and in three other counts he set out causes of action which accrued to himself only. Counsel for defendant in error admit that this was no misjoinder, but say that according to *Jell* v. *Douglas*, 4 B. & Ald. 374, the plaintiff should have shown himself to be the surviving partner of Crocker. The rule that a surviving partner shall declare himself to be such in an action upon a demand due the partnership, appears to be well established, but it is to be observed that the right of a survivor to sue alone without joining the representative of the deceased is not limited to cases of partnership.

"When one or more of several obligees, covenantees, partners, or others, having a joint legal interest in the contract, dies, the action must be brought in the name of the survivor." 1 Chitty's Pl. 19.

If the plaintiff and Crocker, although not partners, were jointly interested in the sum to be recovered, the plaintiff may maintain his action for this and other demands accruing to himself alone. *Vandenheuvel* v. *Storrs*, 3 Conn. 203; *Slipper* v. *Stidstone*, 5 Term. R. 493.

Again, the counts upon indebtedness due the plaintiff alone were certainly good, and as the demurrer was to the whole declaration, it should have been overruled for that reason. Whether a demurrer is general or special, if it go to the whole declaration and there be one good count, it must be overruled. 1 Chitty's Pl. 664.

The judgment of the probate court is reversed, and the cause is remanded for further proceedings.

Reversed.

---

1 177
18 281

DOSS v. CRAIG.

UNLAWFUL DETAINER — *demand for possession.* In an action for unlawful detainer under section 5, chapter 35, Revised Statutes, 333, the plaintiff must aver and prove a demand in writing for possession of the premises which he seeks to recover.

The omission to make such demand **is not cured by plea of title in defendant nor by verdict.**

Error to Probate Court, Pueblo County.

THE information was filed by Craig in the probate court of Huerfano county and thence removed to Pueblo county by change of venue. Complainant alleged that he was the owner of certain agricultural lands in the county of Huerfano, and that he was in possession of them on the 1st day of February, 1866, at which time he let and demised the same to plaintiff in error for and during the period and term of one growing season or year, which period and term expired on the 1st February, 1867. He further alleged that plaintiff in error held over and detained the said lands, but nothing was averred as to a demand in writing or otherwise. A demurrer to the information was overruled, and defendant below pleaded the general issue and title in himself, upon which issues were joined. At the trial, defendant below asked the court to instruct the jury that "if they believed from the evidence that the defendant did not enter upon the premises alleged in bad faith, and that no notice or demand in writing to quit the premises alleged in plaintiff's complaint, and to deliver the premises and possession thereof to plaintiff, his agent or attorney, or any one for him, was made, in writing, of the defendant, his agent, or any one for him, by the plaintiff, his agent or attorney, or any one for him, they will find for defendant," which being refused, defendant excepted.

Mr. A. A. BRADFORD, for plaintiff in error.

Mr. W. F. STONE, for defendant in error.

EYSTER, J. (after stating the facts). In order to maintain a suit under the act it is absolutely and essentially necessary that the plaintiff shall have first made a demand in writing for the delivery of the premises in question. Until this is done he can have no relief under the statute. This being the law, it was the duty of the plaintiff, if such demand was

made, to set it out in his petition as a substantial fact, as required in section 11 of the act. He does not make any such averment in his petition, and of it the defendant complains. It was contended by the defendant in error that the defendant's plea of title in himself was a waiver of any such right to a written demand for the possession of the premises. This is not the law in this case. A party may, by a plea of title in himself, waive a right to notice of the determination of a tenancy, but in this proceeding a demand in writing for the possession of the premises in controversy is widely different from a notice to terminate a tenancy. It was intended by the legislature by such notice to give the defendant an opportunity to surrender the possession and avoid expensive litigation. It is analogous to the demand required in replevin, and as it relates to the possession of lands, the legislature made it more formal, and provided that it must be in writing. Time is not material, it may be made a month or a day before action brought, but it must be made and it must be in writing. A demand, formal according to all of the requirements of the law, and set out in writing, if read to the party, is not sufficient. It must be made in writing and left with the party or it is no demand. 24 Minor, 192. A party cannot be guilty of wrongful detainer until after this demand has been made upon him. Nor was it cured by the verdict. It is of so important a character in this proceeding that no judgment could be rightly rendered against defendant unless it was alleged in the petition, or the absence of it expressly waived. The judgment of the court below is reversed.

Reversed.

REYNOLDS v. THE PEOPLE.

CONSTITUTIONAL LAW. It seems that paragraph 17, section 8, article 1 of the constitution of the United States is not applicable to the territories.

POWERS *of the federal and territorial governments.* The fact that the general government has legislative authority in the territory tends not to diminish or displace the authority of the territorial government but to establish it.

MILITARY RESERVATION — *laws of territory operate within.* An indictment and conviction under chapter 53, Revised Statutes, for selling spirituous liquor without license, at and within the military reservation of Fort Lyon, is good.

Error to District Court, Pueblo County.

Mr. Justice GORSLINE did not participate in the decision of this cause.

Mr. H. C. THATCHER, for plaintiff in error.

Mr. W. F. STONE, District Attorney, third district, for defendant in error.

HALLETT, C. J. The plaintiff in error was found guilty of a violation of the license law in respect to selling spirituous liquors. The sale was made at and within the military reservation known as Fort Lyon, and it is claimed that the conviction is erroneous upon the ground that the law under which it was had was not, at the time of the sale, operative within that reservation. This theory is founded upon the seventeenth paragraph of section eight, article one of the constitution, by which congress is invested with exclusive legislative authority "over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings."

In terms, this clause refers to places purchased by the consent of the legislature of a State, and therefore within a State, and we are not aware of any instance in which it has been applied to a place not within the limits of a State. In *United States* v. *Bevan*, 3 Wheat. 388, the court say of this clause, "It is observable that the power of exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the States."

Again, it has been expressly decided that a place, although within a State, is not subject to the legislation of congress under this clause, unless jurisdiction has been ceded by the legislature of the State in which it is situated.

The People v. *Godfrey*, 17 Johns. 226; *Clay* v. *The State*, 4 Kan. 49.

It seems that this clause of the constitution has no application to the territories. 2 Story on Con., § 1224, *et seq.*; 2 Curtis' History of Constitution, 340.

Upon the general proposition, however, that congress has legislative authority in the territory, no doubt can be entertained. When we consider that the territorial government was established by act of congress, we are ready to concede the jurisdiction of the federal government.

Upon authority, also, the point is not to be questioned. *American Insurance Company* v. *Canter*, 1 Peters, 511; *Leitensdorfer* v. *Webb*, 20 How. 181.

In the case of *The American Insurance Co.* v. *Canter*, it is said that, "in legislating for them (the territories), congress exercises the combined powers of the general and of State government."

The power of congress over a territory is exerted in establishing a government to which is delegated authority to legislate upon all rightful subjects. As we had occasion to remark in the case of *Franklin* v. *U. S.*, *ante*, 35: "Usually all restrictions upon the powers of a territorial government are found in the organic law by which it is established, but sometimes, as in the law punishing bigamy in the territories, and the law prohibiting slavery and some other acts, this rule has not been followed." The body politic thus created is not a sovereignty but an emanation of federal power, standing upon and subordinate to the authority of the general government. Itself, the creature of the federal government, a territory cannot transcend the power of its superior, nor can the authority of the territory be arrayed against that of the general government. There can be no real conflict between them unless the territory, like the gourd in the fable, which disdained its vine, should attempt to cut down the parent stem upon which it stands. The power of the general government, descending upon the territorial government, is thence diffused by the latter, and there is no question of pre-eminence presented. Every act

of the legislative assembly derives its legal force and validity from the organic act, and is subject to disapproval by congress. Indeed, an act of the territorial assembly cannot run into any place of which the federal government has not jurisdiction, for the obvious reason that it proceeds in virtue of the will and power of the latter. We perceive, therefore, that the fact that the general government has legislative authority in the territory tends not to diminish or displace the authority of the territorial government but to establish it. And, as to Fort Lyon, if the general government had no authority there, then, indeed, would the act of assembly be ineffectual in that place; but the general government had full and complete jurisdiction in that place, in virtue of which the territorial act gained force and effect there as well as elsewhere in the territory. This doctrine is not opposed to those considerations which induced the framers of the constitution to give to the general government exclusive control of forts, arsenals, etc., within the several States. If the territorial assembly should attempt to interfere with the functions of the general government in any such place, the act of interference would probably conflict with some act of congress, or it could be made ineffectual by the disapproval of congress.

It is not contended that the legislative assembly was without authority to enact the law upon which the conviction in this cause is based, and we think that law was in force in the reservation of Fort Lyon as well as elsewhere in the territory at the time of the sale by the plaintiff in error.

The judgment of the district court is affirmed, with costs.

Affirmed.

---

1 182
3 221
6 477
6 478
10 112

WESTERN UNION TELEGRAPH COMPANY *v.* GRAHAM.

DISMISSING WRIT OF ERROR — *effect.* If plaintiff voluntarily dismiss his writ when his cause is regularly before the court, this will operate to affirm the judgment of the court below.

If the writ be dismissed for irregularity therein no such effect will follow.

Where a writ was dismissed for want of a cost bond a new writ may be prosecuted in the same cause.

BOND — *execution of, by corporation.* The bond of a corporation was executed by an attorney in fact appointed by the president, pursuant to a resolution of the executive committee of the corporation. Upon motion to vacate the order allowing supersedeas, *held*, that the bond was well executed.

Error to Arapahoe District Court.

UPON motion to vacate order allowing supersedeas and to dismiss the writ of error.

Messrs. CHARLES & ELBERT, in support of the motion.

Mr. ALFRED SAYRE, *contra.*

The chief justice did not sit at the hearing.

BELFORD, J. Two points are presented, on which it is claimed that this motion to dismiss the writ of error should be sustained. First, that a former writ of error was sued out in this case, and voluntarily dismissed by the plaintiff in error. It is conceded in the argument that the cause of the dismissal of the first writ of error was the failure of appellant to file a cost bond. The statute provides, section 14, page 153, that in all actions in law and equity when the plaintiff or person for whose use an action is to be commenced shall not be a resident of this territory, the person for whose use such action shall be commenced, shall, before he institutes such suit, file, etc., with the clerk, etc., a bond for costs, and on failure so to do, the cause shall be dismissed. If no action had been taken by the plaintiff in error in reference to the dismissal, it is clear that the court, on motion of the defendant in error, would have struck the cause from the docket.

In the case of *Hax* v. *Leis*, *post*, 187, where the same principle was to some extent involved, we held, that to make a dismissal of an appeal operate as a bar to a subsequent appeal or writ of error, the appeal must have been dismissed, not for a defective record or insufficient bond or the like, but for a failure to prosecute the appeal after it had been regularly

and properly in the supreme court. A writ of error is a new suit, and before it can be prosecuted, if the plaintiff in error is a non-resident, he must file a cost bond. If he fails to do so, he has no standing in court; his case cannot be heard on the merits, if objection be made. It is not regularly and properly in court, and by dismissal for a failure to comply with the required conditions on which it can be alone prosecuted, it cannot act as an affirmance of the judgment below, or as a bar to a subsequent writ of error. When a dismissal operates as a bar to subsequent proceedings, the cause dismissed must have been in the appellate court regularly and properly in a position to have been heard upon its merits. And being in this position, if the party fails to prosecute his cause in the appellate tribunal, and the same is dismissed, he must abide the consequences, whatever these may be, and cannot be heard at another time. It may be urged, that in allowing a party who has dismissed one writ of error to sue out another we give encouragement to a loose and careless practice. This may be true, but to adopt any other rule would be attended with the most serious and hurtful consequences to the rights of litigants. 1 Duer, 252; *Korth* v. *Light*, 15 Cal. 326; *United States* v. *Pacheco*, 20 How. 263. The second ground assigned for the motion is, that the bond or bonds, for there are two, are defective and insufficient. The first bond and the one on which the writ of error was had, and the supersedeas allowed, purports to be executed by the Western Union Telegraph Company, by Alfred Brewer, its attorney in fact. It is objected that there is no sufficient evidence before this court, showing that Alfred Brewer was authorized to execute this bond. The bond bears date June 30, 1869, and was filed and approved the same day. It further appears from an exhibit in the case, that at a meeting of the executive committee of the board of directors of the Western Union Telegraph Company, held at the principal office of the company in the city of New York, on the 22d day of May, 1869, a resolution was unanimously adopted by said executive committee, authorizing the president of the company and directing him

to make, execute and deliver to Alfred Brewer, of Denver, in Colorado territory, a sufficient power of attorney, in the name and under the seal of the company, authorizing said Brewer, in the name and for the benefit of the company, to execute and deliver any bond, undertaking, security or stipulation in writing, being provided for or required by the laws of Colorado, which it may be necessary to make or give upon the institution or in the prosecution or defense of any and all suits, etc., wherein the telegraph company is a party, which may be now or hereafter brought, etc., in any court of Colorado territory. It further appears from a copy of the by-laws of said company, filed with the bond, that the executive committee shall have the power of the board of directors of the corporation in the management of the business of the company.

Pursuant to the resolution above referred to, the president of the company executed a power of attorney, authorizing Mr. Brewer to make the bond in question, and under and by virtue of such power of attorney, which is filed in the case, the bond was executed. Does this evidence show the consent of the company to Mr. Brewer to execute the bond? We think it does. The evidence, in part, is a transcript of the record of the corporation, and, by that record, the corporation will and must be bound. Even if the facts were different than they appear on the face of the record, that recital must be conclusive on the company. It may be said as to all corporations created by special statutes, that, in the statute of incorporation, either expressed therein, or by reference to the more general statutes respecting incorporations of that character or use, they have an authority and capacity granted therein to establish such rules and regulations as shall be necessary for the well ordering of the affairs thereof. We are, therefore, to look at their rules and their mode of doing business, of well ordering their affairs, which they themselves have adopted, and if they have particularly, or by the rules established, neglected or dispensed with any precautions which, at common law, were deemed essential to the security of the aggregate cor-

porations, if there is sufficient evidence of a common consent, or a just and corporate act, they must be considered as liable when individuals would be injured or deprived of their remedy if any other construction of the doings of the corporation were adopted. While it is true that no individual can represent the corporation in their aggregate capacity, but, in consequence of their consent, still they have powers given them to order their affairs and to appoint and employ agents by votes, or in such other manner as the corporation, by their by-laws, may direct. *Hayden et al.* v. *Middlesex Turnpike Co.*, 10 Mass. 403, 404. In the case of *The American Insurance* v. *Oakley et al.*, 9 Paige, 496, it was held by Chancellor WALWORTH that a corporation may be bound by the acts of its agents, although such acts have not been authorized by a deed or power in writing under its corporate seal, or even by a written instrument not under seal, except in cases when, by the statute of frauds or otherwise, the contract, if made by a natural person, must be reduced to writing to be valid. And again he says: "When the president of a corporation authorizes an attorney or solicitor to prosecute or defend a suit, or to commence any legal proceedings in which the corporation is interested, the attorney or solicitor will be authorized to appear for the corporation, and such corporation will be bound by the acts of their attorney, and if the president exceed his authority in retaining such attorney or solicitor, the corporation must look to him for any damages sustained in consequence of such unauthorized act." It is not necessary to multiply the authorities on this point. Under the decision above referred to, how does Brewer stand? As the attorney of the corporation, clothed with the power to prosecute this suit, and to do all things needful for its prosecution; and if the minutes of the corporation were less clear than they are on this subject, still, under the power of attorney executed by the president of the corporation, he would have the authority to execute the bond; and, when executed by him pursuant to such warrant of attorney, it would bind the corporation.

I have not deemed it advisable to discuss the objections made to the second bond, for the reason that, if the first bond is sufficient (and such we adjudge it to be), the supersedeas could not be overruled. Besides, the second bond, if worth any thing, inures solely to the benefit of the defendant in error, and he certainly can have no especial desire to lessen and diminish the number or character of the securities now at his command.

The motion to vacate the supersedeas and dismiss the writ of error will be denied.

Motion denied.

HAX et al. *v.* LEIS.

1 187
1 183
3 389

PRACTICE—*former adjudication must be pleaded.* Upon motion to dismiss the writ of error, this court cannot determine that the judgment was affirmed on appeal. The former adjudication should be pleaded.

APPEAL—*effect of dismissal upon the judgment.* If an appeal is dismissed for the reason that the appeal bond was not filed within the time fixed by the district court, this will not operate to affirm the judgment, and a writ of error may be prosecuted to reverse the same judgment.

Error to District Court, Arapahoe County.

UPON motion to dismiss the writ of error.

Mr. S. E. BROWNE, in support of the motion.

Messrs. CHARLES & ELBERT, contra.

BELFORD, J. The motion made in this case by the defendant, to dismiss the writ of error, has been carefully considered, and we have reached the conclusion that the same cannot be entertained. The ground upon which this motion rests is, that at the July term of the supreme court, A. D. 1869, this cause was pending in this court on appeal. That, on the thirteenth day of that month, the court, on motion of George Leis, dismissed the appeal, and made the following entry of the order on the journal: "It is ordered by the

court that the appeal herein be dismissed without day, and that said appellee recover of and from the said appellants the sum of dollars and cents for his costs and charges paid out and expended in his defense in this behalf," etc. It is claimed, that the action of the supreme court in dismissing said appeal operated as a bar to any subsequent proceeding, either by appeal or writ of error. That the dismissal was tantamount to an adjudication on the merits and that the doctrine of *res adjudicata* must obtain. If this objection was tenable and the dismissal entitled to be regarded as a bar to subsequent proceedings, and did amount to an affirmance of the judgment below, still it is not raised in the proper way. It must be done by plea and not by motion. We are not at liberty to presume that an appeal was taken and dismissed. True, the fact could be ascertained by an inspection of the record, but the proper way to secure an examination of the record, and to take advantage of the facts recited in it, is to plead the judgment previously rendered and to use the record as evidence of it. The fact that an appeal had been taken and dismissed is an issuable fact, one capable of being affirmed on the one side and denied on the other. It is a rule universally recognized by and practiced upon in the courts below, that a party, claiming advantage of a former adjudication, must specially plead it. We do not know of a case where a different practice has been sanctioned or permitted. But we do not desire to rest our decision on this ground alone.

The courts of this country have had repeated occasions to examine the point presented and have uniformly held, that to make a dismissal of an appeal operate as an affirmance of the judgment below, and as a bar to a subsequent appeal or writ of error, the appeal must have been dismissed, not for a defective record or insufficient bond or the like, but for a failure to prosecute the appeal after it had been regularly and properly in the supreme court. In the case of *Watson* v. *Huson*, 1 Duer, 252, the supreme court of the city of New York held that a dismissal of an appeal was not an affirmance of the judgment. "A judgment," says Mr. Jus-

tice DUER, "affirmed in the court of ultimate jurisdiction, can never again be questioned," and if the effect of the dismission of the appeal was to preclude any further examination or impeachment of the judgment, it might reasonably be contended that the averment in the complaint, that the judgment was affirmed, is sustained by the admitted fact that the appeal was dismissed, and the learned justice observed that to affirm a judgment was to declare by a judicial sentence of the appellate court its validity, and that it was a legal solecism to say that a judgment had been affirmed, when the question of its validity was exactly that which the appellate court refused to consider. In *Karth* v. *Light*, 15 California, 326, FIELD, C. J., delivering the opinion of the court, says: "The cases in which the dismissal of an appeal will not operate as a bar to a second appeal are those when the dismissal has been made upon some technical defect in the notice of the appeal, or the undertaking, or the like. The bar applies when the dismissal is for want of prosecution, and the order is not vacated during the term, or the dismissal is on the merits." How stands the case before this court? It is conceded that the appeal bond was not filed within the time prescribed by the court, and the appeal was dismissed for that reason. It had never been perfected. There was really no case before the appellate court for trial. The appeal was simply void. The condition necessary to vitalize it was wanting, the bond not having been filed in time. In the case of the *United States* v. *Juan de Pacheco*, 20 How. 263, TANEY, C. J., in delivering the opinion of the court, says: "It is proper, however, to add, in order to prevent mistake on this subject, that the only effect of docketing and dismissing an appeal under this rule is to enable the party to proceed to execute his judgment in the court below. It removes the bar to further proceedings in that court which the appeal created, and does nothing more, and after the case has been docketed and dismissed, the party against whom the decree was rendered may still, at any time within five years from the date of the decree, take a new appeal in the inferior court."

And again, on page 264, he remarks further: "It follows from what we have said, although the case before us must be docketed and dismissed, yet this will not prevent the United States from filing a transcript at the present term, and docketing the case for argument, if they can show that the delay has not arisen from any fault or negligence on their part, and if they fail to do so, they may yet take another appeal at any time within five years, and bring here the decree of the district court for examination and reversion," and to the same effect will be found the case of the *United States* v. *Gomez*, 23 How. 327. It may be proper for us here to inquire as to the effect of a dismissal of an appeal on the rights of a party interested in the bond. We are of the opinion that the dismissal of an appeal for any reason entitles the appellee to have suit on the bond. The very object in exacting a bond is to guard against delay, etc., and to afford to the appellee compensation for a failure to enjoy and reap the immediate fruits of the judgment he has obtained. The covenant is, that the obligor will prosecute his appeal with due diligence. If he fails to file his transcript in time, or neglects to perform any duty requisite and essential to place his case properly before the supreme court, so that the cause can be heard, he is guilty of a breach of his obligation, and the appellee is entitled to an immediate action to recover whatever damages he has sustained by reason of such failure. A different interpretation of the law would lead to fraud and injustice, subjecting creditors in many instances to the entire loss of their debts. Appeals would be taken without an expectation of successful prosecution by principals, and the bonds entered into by sureties without the fear of responsibility. *Harrison, etc.* v. *Bank of Kentucky*, 3 J. J. Marsh. 376.

While we are of the opinion that when an appeal regularly taken is dismissed for want of prosecution, the dismissal operates as an affirmance of the judgment below, and a second appeal cannot be allowed, unless during the term or before the remittitur has gone out, the order of dismissal is vacated and the cause re-instated. *Chamberlin* v. *Reed*, 16

Cal. 209. Still, we cannot sanction the doctrine that a dismissal for the failure to file a proper bond has that effect, and hence we are compelled to overrule the motion made to dismiss this writ of error.

Motion denied.

---

1 191
7 552

KINNEY v. WILLIAMS.

INSTRUCTIONS *must be confined to the law of the case.* The existence of facts proper for the consideration of the jury must not be assumed in the instructions of the court.

DAMAGES — EXEMPLARY — *to be determined by the jury.* Whether exemplary damages shall be awarded in an action of trespass is a question for the jury.

PRACTICE — *costs denied.* Where a motion for new trial has not been presented in the time and manner directed by the court the party in fault will not be allowed costs.

Appeal from District Court, Jefferson County.

THIS was an action of trespass against appellant and others, to recover damages for an assault upon appellee, and for making a loud noise and disturbance in and about appellee's dwelling-house, at various times. There was evidence tending to prove that appellee was severely beaten upon one occasion by appellant, and others of the defendants below. The jury returned a verdict in appellee's favor for $2,500 damages.

The following is the instruction referred to in the opinion of the court:

"The court instructs the jury that they are at liberty to consider the malice of the defendants, the insulting character of their conduct, the rank in life of the several parties, and all the circumstances of the assault, if any was committed, and to award such exemplary damages as the circumstances of the case may, in their judgment, require, and are not restricted to the mere corporal injury of the party."

The cause was tried at the March term of court, and motion for new trial then made. The court directed that

written arguments should be filed on this motion by July first, following, which was not done. At the September term the motion was formerly overruled, and judgment rendered on the verdict.

Messrs. ROYLE & BUTLER, for appellant.

Mr. G. W. PERKINS, for appellee.

HALLETT, C. J. The first instruction given to the jury at appellee's request upon the trial below assumes the existence of facts which should have been left to the jury, and is in conflict with the twenty-eighth section of the practice act. Whether this was a case for exemplary damages was a question for the jury and not for the court. The jury may have understood this instruction as determining this question for them.

For this error the judgment must be reversed and the cause remanded for a new trial.

If the motion for new trial had been presented in the court below, as directed by that court, there is little doubt that the relief now granted here would have been given in that court, and the expense and delay of this appeal would have been avoided. Because of this neglect, the appellant will not be allowed his costs in this court or in the court below.

The court below is instructed to tax the costs, which have been made by appellant in that court, to him.

Reversed.

SCUDDER v. CLARKE.

BILL OF EXCHANGE — *order for lumber is not.* An order for lumber, drawn by S. upon R., is not a bill of exchange, and the drawer is not liable upon it.

Error to Probate Court, Arapahoe County.

Mr. ALFRED SAYRE, for plaintiff in error.

EYSTER, J. This was an action of assumpsit, brought by the defendant in error against the plaintiff in error, in the probate courrt of Arapahoe county, on an instrument in writing, of which the following is a copy, as set forth in the pleadings:

"DENVER, *July* 22, 1867.

"Mr. Edward Rawlings. Sir: please deliver to Mr. Clarke or bearer four thousand feet of lumber and charge, as agreed, to my account. EDWIN SCUDDER."

There were two counts in the plaintiff's declaration. The first was a special count on the instrument, as above set forth, and the second was the common indebitatus assumpsit count for work and labor, goods sold and delivered, etc.

The defendant demurred to the first count of the plaintiff's declaration, and pleaded the general issue to the second count. The court below overruled the demurrer, and the defendant stood by his demurrer and refused to plead. The plaintiff then withdrew the second count, and a jury was sworn to assess the plaintiff's damages on the first count in his declaration. The jury, after hearing the evidence submitted to them on the first count, rendered their verdict, assessing the plaintiff's damages at $100. A motion for a new trial was made by defendant, which was overruled, to which the defendant then and there excepted, and which, with the ruling of the court on the defendant's demurrer, is here assigned for error.

The only question for decision by this court is: Was the instrument sued on a bill of exchange or promissory note? Was it such an instrument as involved the personal responsibility of the drawer of it? We think it was not, it was not a bill of exchange, it had not one of the requisites of such an instrument. It was a mere request made by the defendant to Rawlings to deliver to the plaintiff or bearer four thousand feet of lumber and no more. In the case of *Mershon* v. *Withers*, 1 Bibb, 503, the supreme court say in reference to a similar case: "The bill in its subject-matter and consequences was not as supposed in the declaration.

It was drawn on a particular fund, it could not make the drawer personally liable, and, therefore, was no bill of exchange according to the custom of merchants; for it is essential to such a bill that it depends upon the personal credit and responsibility of the parties whose names are on it, without such personal credit and capacity to charge the drawer and drawee the bill is not negotiable according to the usage of merchants, and if not negotiable the parties to it are not liable to an action on it."

In the case of *Nichols, Administrator*, v. *Davis*, 1 Bibb, 490, the same court say in a case not dissimilar to this, "most clearly it (the instrument in question) does not possess the properties nor is entitled to the privileges of that commercial instrument (a bill of exchange). It is an essential quality of a good bill, that it attach to itself the personal responsibility of the drawer, and be not drawn on the credit of any particular fund. But in the present case the instrument is drawn on the credit of a particular fund and does not involve the personal responsibility of the drawer. It can only be considered as an appointment or authority to the person to whom it is addressed to pay so much out of the particular fund mentioned, which if they refuse to do no recurrence can be had upon the instrument itself to the drawer, but recourse must be had to the original debt (if any such existed), which induced him to make such appointment."

These cases we think are conclusive of the points in this case, and the judgment of the probate court must be reversed, and the court below is directed to enter judgment on the demurrer of the defendant below, to the declaration of the plaintiff in this suit.

Reversed.

1 194
14 19
14 20

LOVELAND v. SEARS.

JURISDICTION *of district and probate courts.* District and probate courts, within the limits prescribed to the latter, are of concurrent jurisdiction.

CERTIORARI will not lie from a district to a probate court.

Appeal from District Court, Arapahoe County.

Messrs. MILLER & MARKHAM, for appellant.

Mr. E. L. SMITH, for appellee.

HALLETT, C. J. After judgment in the probate court, the cause was removed to the district court by *certiorari*, and the latter court quashed the writ upon appellee's motion. In his petition to the district court, the appellant prayed that the writ might be issued in pursuance of the statute, but it is not possible to ground this proceeding upon that act. The act refers to proceedings before justices of the peace, and it is impossible to extend it to probate courts. If, in this instance, the probate judge had been acting as a justice of the peace, there would be some ground for saying that the proceedings were subject to removal according to the statute, but such was not the fact. The cause originated in the probate court, and was not within the jurisdiction of a justice of the peace. Therefore this writ cannot stand upon the statute, and we will now inquire whether it may stand upon the common law.

By the common law the writ of *certiorari* lies for the removal of causes from an inferior to a superior tribunal. 1 Tidd's Prac. 398.

Hence the first question arising in every case is as to the jurisdiction of the court from which the writ is issued; for if the court to which the cause is taken is not superior to that from which it is removed, of course the writ is nugatory. In *Davis* v. *Cass*, *ante*, 43, this court held that the district and probate courts, within the time prescribed to the latter, were of concurrent jurisdiction, the supreme court being invested with authority to revise the proceedings of either. It is true that in that case the subject of appeals only is discussed, and nothing is said of the proceeding by *certiorari*. Nevertheless, the power to review the decisions of probate courts was found to be in the supreme court and not in the district court, and this is decisive of this question. It would be strange indeed if district courts could review

proceedings of probate courts upon *certiorari* when they are unable to proceed to the same result upon appeal or writ of error.

The judgment of the district court is affirmed, with costs.

Affirmed.

---

1 196
12 552

CAROTHERS v. JONES.

FORMER RECOVERY — *conclusive.* In an action of replevin it appeared that the property in dispute had been the subject of another suit, and the record of that suit being introduced in evidence, a verdict contrary to the judgment in the first suit will not be sustained.

NEW TRIAL — *where the verdict is not supported by evidence.* In an action of replevin for two mules, a wagon and harness, there was no evidence as to the wagon and harness. A general verdict for the plaintiff will be set aside and a new trial awarded.

Error to District Court, Jefferson County.

JONES brought replevin against Carothers for two horse mules, one set double harness, one large double wagon; each of said mules branded T on the left shoulder, and each about eight years old; one dark brown color, the other a lightish bay color, known as the Tucker mules.

At the trial Arthur McLaughlin testified: He knew property in dispute; it is one span of horse mules, one light bay, one dark brown and branded T on left shoulder, they are known as the Tucker mules; bought in Georgetown of Tucker in September, 1867; property paid for in hay and potatoes. Defendant told me he was to have one-half of the mules if he paid for them; defendant paid nothing, told me he had nothing to do with the mules. Mules worth $400, wagon, $75; harness, $25. Plaintiff kept possession of mules until May 15, 1868; the defendant took possession and kept them till August.

Cross-examination: The defendant got possession of the mules from the sheriff of Park county. I was present at the term of court in Park county in 1868.

Jesse McLaughlin testified: Plaintiff obtained the mules

of Tucker, to be paid for in hay and potatoes. Defendant told me he had nothing to do with the mules, that Jones owned them. I was present when parties settled; allowed defendant $30 a month for his work; this took place the last of January, 1868; defendant came with the sheriff and took the mules and replevied them.

Defendant gave in evidence a transcript of record from the probate court of Park county, which record was of a suit between John M. Carothers, plaintiff, and William M. Jones, defendant; declaration in replevin for one dark-brown mule, one bay mule, both branded T on left shoulder, one four-mule wagon and a double harness. This transcript showed a judgment for the plaintiff, that he retain possession of the property replevied, and that he recover his costs of suit, etc. Jesse McLaughlin testified that the mules in controversy, in the probate court of Park county, were branded T on left shoulder, and that one was a dark-brown mule, and the other a light-bay mule. Arthur McLaughlin testified that the property replevied by Carothers in Park county were two large mules, one light-bay, one dark-brown, a double harness and a four-horse wagon.

Mr. JAMES MARSHAL PAUL, for plaintiff in error.

Mr. L. C. ROCKWELL, for defendant in error.

BELFORD, J. William M. Jones, the defendant in error, instituted his suit in replevin against John M. Carothers, the plaintiff in error, in the district court of Jefferson county. The property sought to be recovered in this action consisted of two mules, a two-horse wagon and a set of double harness. The property is described in the plaintiff's affidavit as follows: "Two horse mules, one set of double harness, one large double wagon; each of said mules branded T on its left shoulder, one of a dark-brown color and one of a light-bay color, known as the Tucker mules." The defendant, Carothers, filed several pleas, *non cepit*, *non detinet*, and one setting up title in himself. The cause was tried by a jury, who returned a verdict for the plaintiff. A motion

was made by the defendant for a new trial, which was overruled and excepted to.

Judgment was entered on the verdict and the defendant appeals to this court.

The errors assigned are two: First, that the verdict of the jury was contrary to the evidence; second, that the court erred in overruling the motion for a new trial. Appellate courts are very reluctant to interfere with the verdict of a jury, and especially so when there is evidence tending to support it. The jurors have the witnesses before them, hear them testify, observe the manner in which their evidence is given, and are in a better situation to estimate correctly the weight to be attached to their testimony than is a court whose impressions of the evidence are simply drawn from a perusal of the record. For these reasons the supreme court will only interfere when it is clear and manifest that injustice will result from upholding a verdict. From the evidence incorporated into the bill of exceptions, it appears that the mules in controversy were purchased by Jones and Carothers in September, 1867, of one Tucker. These mules remained in the possession of Jones from September, 1867, until May 15, 1868, when they were delivered into Carothers' possession by the sheriff of Park county, by virtue of a writ of replevin. Carothers retained possession until August, 1868, when the mules were taken by the sheriff of Jefferson county and delivered to Jones in pursuance of a writ of replevin, issued out of the Jefferson district court in the suit of Jones against Carothers. To establish his title to the mules, Carothers introduced in evidence a transcript of the record of the probate court of Park county, from which it appears that, at the June term, 1868, of said probate court, Carothers had instituted an action of replevin against Jones for the recovery of one brown mule, branded on the left shoulder with the letter T, also one bay mule branded on the left shoulder T; also a four-mule wagon and set of double harness. A trial was had, a verdict rendered in Carothers' favor, and it was ordered by the court that the plaintiff in that suit retain possession of the property. Whatever objection

may exist to the form of the judgment rendered in the Park probate court, none was made either to its form or validity in the court below. And no cross-errors having been assigned by the defendant in error, I regard said judgment for the purposes of this suit as valid and effectual. Were the mules replevied by Jones in the action below the same mules replevied by Carothers in his suit in the Park probate court? I think there can be no doubt of it, when we compare the description of the property in the two suits. Jones, in his affidavit, describes them as the Tucker mules. The evidence introduced shows conclusively that Jones kept possession of the mules bought of Tucker, until dispossessed by the sheriff of Park county, under the authority of a writ of replevin; that then Carothers obtained possession of these same Tucker mules, and that the mules in controversy in the court below were the identical mules purchased by Jones and Carothers of Tucker in Georgetown, September, 1867.

If the proceedings of the Park probate court are to be regarded as valid, and the title to these mules between these same parties was settled in that suit, then this second action should not and cannot be maintained. The verdict should have been set aside and a new trial awarded. But this verdict cannot be maintained on another ground. The jury found that the plaintiff below was the owner of the wagon and harness; and in that verdict the same was adjudged by the court to Jones. There is not one particle of evidence to sustain this finding; not a single witness testified on the subject. The finding was entirely unauthorized and unwarranted, and to permit such a verdict to stand is to do violence to the rights of property and injury to the principles of justice.

The action of the court below in denying a new trial must be reversed and the cause remanded for further proceedings.

Reversed.

1 200
3 240

1 200
15 367

1 200
23 521

PATTERSON v. GILE.

STAMPS — *need not be canceled.* An instrument which has been stamped according to the revenue laws of the United States may be read in evidence, although the stamp thereon has not been canceled.

SAME — *construction of the act relating to.* Whether an instrument is admissible in evidence, under the act of 1864, is to be determined by section 163 of that act as amended (14 Statute at Large, 143).

PLEADING — *want of consideration.* In an action upon a promissory note, want of consideration must be specially pleaded.

Error to Probate Court, Arapahoe County.

ASSUMPSIT on a due bill for $365.36. Plea general issue, under which defendant offered evidence of want of consideration, was rejected.

Mr. W. C. KINGSLEY, for plaintiff in error.

Mr. L. B. FRANCE, for defendant in error.

HALLETT, C. J. When the due bill, upon which this action was brought, was produced at the trial in the court below, it bore revenue stamps of sufficient amount, but the stamps had not been canceled. The court permitted the attorney of the plaintiff below to cancel the stamps and allowed the instrument to be read in evidence against the objection of the plaintiff in error, who now insists that this ruling was erroneous. By section 158 of the revenue act, a penalty is provided for any violation of the act in respect to the stamping of instruments in cases where the omission or neglect to stamp is with an intent to evade the provisions of the act, and it is also declared that the instrument which is omitted to be stamped with such intent shall be deemed invalid and of no effect. By some courts it has been considered that the omission to stamp an instrument, whether fraudulent or not, will invalidate it. *Hugus* v. *Strickler*, 19 Iowa, 414; *Maynard* v. *Johnson*, 2 Nev. 16, 25.

But the weight of authority is opposed to this construction, and finds the forfeiture of the instrument to be a penal

consequence of a fraud upon the act. *Harper* v. *Clark*, 17 Ohio St. 190; *Hitchcock* v. *Sawyer*, 39 Vt. 412; *Hallock* v. *Jaudin*, 34 Cal. 175; *McGovern* v. *Hoesback*, 53 Penn. 178.

After a careful study of the act I have not been able to convince myself that the omission to stamp an instrument, under any circumstances, will render such instrument invalid and of no effect, and therefore I do not perceive the importance of ascertaining the intention of the maker in omitting the stamp, except it be with reference to the penalty of $50 prescribed by the act in cases of intentional omission. I comprehend the clause above referred to, which declares that the instrument shall be invalid and of no effect if the omission to stamp it be with intent to evade the provisions of the act, but I find in the same section provisions for stamping all instruments not stamped at their inception, whatever the intention of the maker in omitting to stamp them at the proper time. It is provided "that hereafter, in all cases where the party has not affixed to any instrument the stamp required by law thereon at the time of making or issuing the said instrument," upon complying with certain conditions prescribed by the act, the collector of the revenue for the proper district may affix the stamp, and the instrument "shall thereupon be deemed and held to be as valid to all intents and purposes as if stamped when made or issued."

Inasmuch as every instrument not stamped may be perfectly stamped under this clause, and thus invested with all its legal attributes, I am not able to say that any unstamped instrument is, for want of the stamp, invalid and of no effect. I understand that an invalid instrument cannot be validated by the simple act of a government officer affixing a stamp. If an instrument be absolutely invalid and of no effect, it must remain so until it receive life at the hands of its authors.

The legal status of an unstamped instrument is not easily defined, but so long as the law admits it to be stamped I cannot regard it as a nullity.

This view is, I think, supported by section 163 of the act

which was enacted in 1866, and which prescribes the only condition of the revenue law, upon which an instrument may be admitted as evidence in a court of justice. That section declares:

"That, hereafter no deed, instrument, document, writing or paper, required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof shall be recorded or admitted or used as evidence in any court until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto as prescribed by law."

Accepting this plain declaration as it is written, it is obvious that the circumstances attending the omission to stamp an instrument are entirely immaterial. If the instrument has not been stamped, it cannot be used as evidence although the omission to stamp it may have been entirely accidental and without any design to evade the act. If it has been stamped by the maker at its inception or by the collector subsequently, as provided in section 158, it is wholly immaterial whether the maker intended to defraud the government of the tax imposed upon the instrument. Under this section but one question can arise concerning an instrument offered in evidence, and that is, whether it has been stamped as the act requires, and upon the answer to this question the instrument should be admitted or excluded. Therefore as I find that, according to section 163, the only question respecting the admissibility of an instrument as evidence is, whether it has been stamped as the law prescribes, and that while section 158 denounces a penalty against a fraudulent omission to stamp an instrument, it also provides for affixing a proper stamp to every instrument which requires it, and which has not been stamped when made. I conclude that the intention of the maker of an unstamped instrument is not material in determining the legal character of such instrument, and that so much of the latter section as appears to establish a different rule must receive a construction which will make it harmonize with the other provisions of the act.

I have attempted to show that an instrument is to be rejected or received in evidence upon the provisions of section 163 of the revenue act, and none others, and if I have succeeded in this, the remaining inquiry is, whether the due-bill in this case was admissible according to the provisions of that section.

When the instrument was offered in the court below it bore sufficient revenue stamps, and although these stamps were not canceled, I think we may fairly presume that they were placed upon the due-bill at the time it was made. Certainly, if the stamps had appeared to be canceled the court would have indulged such presumption, and, because the maker omitted the cancellation, it is somewhat illogical to say that he also omitted to affix the requisite stamps.

The object of the law in requiring the stamp to be canceled, as declared by section 156, is to prevent another use of it, and, while it may be said that the date placed upon the stamp in canceling it, affords some evidence of the time when the stamp was placed upon the instrument, the act does not make it evidence of that fact. The law requires the stamp to be put upon the instrument when the latter is made, and leaves this fact to be proved in the same way that every other controverted fact is proved. If an instrument appears to be stamped, the law will, in the absence of evidence to the contrary, assume the stamps to have been properly affixed, for the reason that it cannot be presumed that any one has attempted a fraud upon the act, until the fact is established by testimony. Assuming that the stamps were placed upon the due-bill when it was made, I think that the provisions of section 163 were observed. The act of stamping an instrument is accomplished by affixing a stamp or stamps denoting the duty imposed by law upon such instrument. The cancellation is another and different act prescribed for another purpose. By the act of stamping, the payment of duty upon the instrument is accomplished; by the cancellation the fraudulent use of the stamp is prevented. I cannot doubt that, if an uncanceled stamp should be removed from an instrument to which it had been properly affixed, with

intent to use it again in fraud of the act, the offender would be subject to the penalty announced in section 155. A party guilty of such an offense could never take refuge under the circumstance that the stamp fraudulently used by him lacked cancellation. Therefore the omission to cancel the stamp upon an instrument, while, if intentional, it will subject the party to the penalty of $50.00, prescribed in sections 156 and 158, does not in any way affect the legal character of the instrument, and I respond to the requirements of section 163, by saying that the due-bill in this case was stamped as required by law.

This discussion has been extended beyond the limits required by this case, for the purpose of showing that we are unable to recognize the doctrine promulgated by many State courts, that an instrument required by law to be stamped, may be used as evidence in a court without being stamped. As a territory, we derive our political existence and every political right and privilege that we enjoy from the general government, and therefore we cannot deny the power of that government to legislate upon this subject in this way, as did the supreme courts of Illinois and Massachusetts. *Latham* v. *Smith*, 45 Ill. 29; *Carpenter* v. *Snelling*, 97 Mass. 452.

We recognize the power of the congress to enact this law, and, according to the one hundred and sixty-third section of the act, we will require every instrument to be stamped according to the provisions of the act before it is used as evidence.

Another question presented in this record, and strongly urged by the counsel for plaintiff in error, has been determined in the State of Illinois, and we are disposed to adopt the ruling of that court. It has been the practice in this territory, since the present statute relating to bills of exchange and promissory notes was enacted, to plead a want or failure of consideration specially, and since the statute is not very clear upon this point, we think it better to uphold the rule which has been hitherto observed than to attempt to change it. The supreme court of Illinois was evidently

influenced by a desire to maintain the rule as it had been understood and practiced by the profession, and we may, with propriety, act upon the same consideration. *Rose* v. *Mortimer*, 17 Ill. 475.

If the statute were opposed to this rule, of course we should be compelled to abandon it. But the statute groups together the several defenses of want and failure and partial failure of consideration, and declares that they may be pleaded, and, inasmuch as it was certainly intended that partial failure of consideration should be specially pleaded, we may say that it was also intended that want or failure of consideration should be specially pleaded. At all events the profession have so construed the act from the first, and we will not now seek a new construction.

The judgment of the probate court is affirmed, with costs.

Affirmed.

LONGAN v. CARPENTER.

1 205
16a 288
e16a 292

MORTGAGE — *not assignable at law.* The assignee of a mortgage has no remedy upon it at law, except it be treated as an absolute conveyance and the mortgagee convey the premises by deed.

Same — assignable in equity. But if a promissory note secured by mortgage is assigned, the assignee will hold the mortgage subject to the equities existing between the mortgagor and mortgagee at the date of the assignment.

MORTGAGE ASSIGNED — *rights of parties.* At law the innocent holder of a negotiable note may recover the amount thereof; but if the note is secured by mortgage and the holder seeks to foreclose the mortgage, the mortgagor can avail himself of any payments made to the mortgagee before the assignment.

A promissory note secured by mortgage and by pledge of personal property was assigned before maturity to a *bona fide* purchaser. Previous to the assignment a portion of the pledged property was sold by the payee, but no credit was indorsed on the note. In a suit by the assignee to foreclose the mortgage, *held*, that the mortgagor was entitled to be credited with the amount realized by the payee from the sales of the pledged property.

Appeal from District Court, Jefferson County.

APPELLEE filed his bill to foreclose a mortgage given by appellant to Jacob B. Carpenter. He alleged that the mort-

gage was given to secure a note for $980, dated March 5, 1867, payable six months after date at the Colorado National Bank to Jacob B. Carpenter or order, that on the 24th of July, 1867, Jacob B. Carpenter assigned the note and mortgage to him.

Appellant in her answer denied all knowledge of the assignment and averred that, at the date of the mortgage, in addition to the mortgage security, she delivered to J. B. C. as collateral and further security for the sum of money specified in the note and mortgage, 103 sacks of good merchantable wheat flour then of the value of $1,236, and 7,500 lbs. of wheat then of the value of $450, which, she alleged, said J. B. C. agreed to sell and apply to the payment of the sum due him on said note and mortgage; or, if not sold, to return on payment or tender of payment of the sum of money specified in the note and mortgage. Appellant also alleged, that, at the maturity of the note, she tendered the sum of $1,180 at the Colorado National Bank in payment of the note, and demanded the return of the note and mortgage and the flour and wheat to her, which was refused. Appellant averred further, that J. B. C. appropriated the said flour and wheat, of the value of $1,686, to his own use and refused to account therefor. The master found that there was due upon the note and mortgage $1,622.68. At the hearing, the deposition of William Longan was read. He testified that the mortgaged premises belonged to his mother, the appellant; that appellant borrowed from J. B. C. $980, and gave the mortgage and 100 sacks of flour and 7,520 or 7,530 lbs. of wheat as security; that the flour and wheat were in a house on Blake street belonging to Williams & Miller, and that J. B. C. took Williams & Miller's receipt for it; that J. B. C. authorized witness and his brother to take the flour and wheat to the mountains and dispose of it, if they would pay to Williams & Miller the market price for the same in Denver; that Williams & Miller should indorse the amount so paid on the note. That, in the latter part of April or 1st of May, 1867, witness

got 560 or 660 lbs. of wheat from Williams & Miller and paid them 4½ cents per lb. for it; that this was a portion of the wheat given to J. B. C. as aforesaid; witness at other times got flour of the same lot and paid Williams & Miller therefor at $8.50 a sack; witness could not tell the exact number of sacks he got; in July, 1867, Williams & Miller failed in business and witness found a lot of the flour and wheat being disposed of; witness went to J. B. C. and tried to get him to save the wheat and flour. J. B. C. stated that he was not going to get himself in any law suit about it, and declined to take any steps about the matter; said that he was sufficiently secured by the mortgage and that he would give the warehouse receipt for the flour and wheat back to witness; that he would assign the receipt to witness so that he could go and get the flour and wheat.

Witness further stated that, after Williams & Miller failed, Mr. Miller of that firm told him that J. B. C. was the owner of the flour and wheat, and that he would account to him alone for it, which he had done, and that J. B. C. had authorized its disposal, and that witness would look at Williams & Miller's books and they would show just what had been done with the flour and wheat. Witness told J. B. C. what Miller had said, and J. B. C. said he would give witness the receipt. When witness asked him where it was, he said witness would have to go to his lawyers as they had his papers. On cross-examination witness stated: The wheat and flour was in the warehouse of Williams & Miller before the loan was made; that we had before that time borrowed money, about $600, on the flour alone; the first loan was about sixty days before that of J. B. C.'s was made; the grain and flour belonged to witness and his brother; the warehouse receipt was given to Mr. Kountze as security for the first loan; the old warehouse receipt was taken up, with the money borrowed of J. B. C., and the first loan so paid off.

Jesse B. Longan testified that he pledged the flour and grain to J. B. C. as security for the payment of the note;

that he had previously borrowed money at the bank, and that Williams & Miller became his security therefor, and they had the flour in their possession; that Williams & Miller arranged the loan with J. B. C. and that the money was borrowed of J. B. C. for himself and his brother William Longan; that the flour and wheat were owned by himself and William Longan; in other respects his testimony was substantially the same as that of William Longan.

Jacob B. Carpenter testified that he assigned the note and mortgage to B. Platte Carpenter, the complainant below, in July, 1867; that, when the flour and wheat were pledged to him, it was understood that the same should lay in the store of Williams & Miller until the note became due, unless the Longans should take a portion thereof to the mountains, and in that event, the Longans would pay to Williams & Miller the market price therefor in Denver, and the amount so paid was to be indorsed on the note. This witness also testified as to the circumstances attending the failure of Williams & Miller. He also stated that he received $1,000 upon the assignment of the note and mortgage, and that he never received any of the proceeds of the sales of the wheat and flour nor ordered the sale of it, nor exercised any control over it in any manner whatever.

There was other testimony corroborating the foregoing and also conflicting testimony as to the tender alleged to have been made by the respondent, which it is unnecessary to refer to. An assignment of the mortgage executed by J. B. C. was given in evidence and also the promissory note before mentioned, which was signed by Mahala Longan and Jesse B. Longan, and appeared to have been indorsed without recourse by J. B. C.

The court decreed for the complainant below, and found that there was due to him the sum of $1,820, being the full amount of the note, and that the mortgage premises be sold to satisfy the same.

Messrs. BROWN & MECHLING, for appellant.

Mr. ALFRED SAYRE and Mr. DANIEL SAYRE, for appellee.

BELFORD, J. This was a bill in chancery to foreclose a mortgage filed by the appellee, as the assignee of one Jacob B. Carpenter. The mortgage was given to secure a negotiable note. The mortgage bears date March 5th, 1867, and is payable to Jacob B. Carpenter or his heirs or assigns, and was by him assigned to the complainant on the 20th day of July, 1867. The assignment was properly recorded on the 7th day of February, 1868. The defendant, in her answer, denies all knowledge of the assignment, and avers that at the date of said mortgage, she, in addition to the said mortgage security, delivered to the said Jacob B. Carpenter, as collateral and further security for the payment of the said sum of money, specified in said note and mortgage, one hundred and thirty sacks of good merchantable wheat flour, then of the value of $1,236, and seven thousand five hundred pounds of wheat of the value of $450, which she alleges said Carpenter agreed to sell and apply to the payment of the sum due him on said note and mortgage, or, if not sold, to be returned on payment or tender of payment of said note and mortgage. She further charges that said Carpenter sold said flour and wheat, and appropriated the sum to his own use, and refuses to account to her for the proceeds. This cause has been ably argued by counsel, and has received great consideration from this court. The principle involved has never been before adjudicated in this territory, and in the States where it has received judicial notice the decisions are in direct conflict. It is claimed by the appellee that the note secured by the mortgage is a negotiable note, that it was negotiated before due, and that the assignee being a *bona fide* purchaser of the note without notice, took it and the mortgage freed and discharged from all equities and defenses that existed in favor of the mortgagor and against the mortgagee. There is no evidence showing that B. Platte Carpenter had, before or at the time of the assignment of the note, any knowledge of the wheat and flour given by Mahala Longan as further security to Jacob B. Carpenter.

It is contended by the appellant, that, having taken

security by way of mortgage, that that security qualifies the rights of the mortgagee and those claiming under him, and that, when an action is brought to foreclose the mortgage, that that instrument, together with the note secured thereby, passes into the category of obligations to which defenses and equities may attach and be made available into whosesoever hands they fall. We are free to admit that this question is surrounded with great difficulties, and deeply regret that no settled and uniform rule exists in this country on the subject. The supreme courts of Wisconsin, Michigan and Illinois, so far as we have been able to discover, are the only courts that have passed upon the matter in controversy. In Illinois, the rule is laid down as claimed by the appellant. They hold there that, although the note secured by the mortgage is negotiable, still it is open to whatever defenses existed against the mortgagee. A different rule obtains in Wisconsin and Michigan. Amid this conflict of authorities, we feel at liberty to choose our course, and shall endeavor to follow that which, in our judgment, is recommended by the better reason. What relation does a mortgage sustain to a note secured by it? In one sense, it is a mere incident to the debt. He who owns the note owns the mortgage. The assignee of the former is entitled to the benefits of the latter, although the assignee did not know of its existence. *Kyes* v. *Wood*, 21 Vt. 331. But it must be borne in mind that these principles are the outgrowth of equity, and equity alone. At common law, choses in action were not assignable. For the convenience of commerce, by the statute of Anne, in England, certain choses in action were made assignable, so as to vest in the assignee the legal title, as promissory notes or bills of exchange. We have a statute to the like effect, which prescribes that any promissory note, bill, bond or other instrument in writing, whereby one person promises to pay another any sum of money or article of personal property, or sum of money in personal property, shall be assignable by indorsement thereon.

The mortgage, to foreclose which this bill was filed, was

given to secure the payment of a promissory note which was assigned by the payee and mortgagee to the complainant. This was in equity an assignment of the mortgage. The note was assignable by the statute, but the mortgage is not nor is it assignable by the common law. The assignee of a mortgage has no remedy upon it by law, except it be treated as an absolute conveyance, and the mortgagee convey the premises by deed. The 22d section of the statute, page 377 (Revised Statutes of Colorado), provides that if default be made in the payment of any sum of money secured by the mortgage on lands and tenements duly executed and recorded, it shall be lawful for the mortgagee, his executors or administrators, to sue out a writ of *scire facias*, etc. Here the remedy is specifically confined to the mortgagee, his executors or administrators. The assignee cannot proceed at law and sue out a *scire facias*. To avail himself of his mortgage security he is driven to the court of chancery. His remedy is purely equitable, and seeking equity he must be willing to do equity. He who buys that which is not assignable at law, relying upon a court of chancery to protect and enforce his rights, takes it subject to all infirmities to which it is liable in the hands of the assignor, and the reason is, that equity will not lend itself to deprive a party of a right which the law has secured him, if such right is intrinsically just in itself. "Mortgages," says Chief Justice CATON, in *Olds* v. *Cummings*, 31 Ill. 192, "are not commercial paper. It is not convenient to pass them from hand to hand, performing the real office of money in commercial transactions as notes, bills and the like. When one takes an obligation secured by a mortgage, relying upon the mortgage as security, he must do it deliberately, and take time to inquire if any reason exists why it should not be enforced. While he may take the mere promise to pay the money as commercial paper and depend upon the personal security of the parties to it, it may be said to be a distinguishing characteristic of commercial paper, that it relies upon personal security, and is based upon personal credit. It is a part of the credit system, which is said

to be the life of commerce, which requires commercial investments to pass rapidly from hand to hand. Mortgage securities are too cumbersome to answer these ends. The note itself, though secured by a mortgage, is still commercial paper, and when the remedy is sought upon this, all the rights incident to commercial paper will be enforced in the courts of law. But when the remedy is sought through the medium of the mortgage; when that is the foundation of the suit, and the note is merely used as an incident to ascertain the amount due on the mortgage, then the courts of equity, to which resort is had, must pause and look deeper into the transaction and see if there be any equitable reason why it should not be enforced. He who holds a note and also a mortgage holds in fact two instruments for the security of the debt; first, the note with its personal security, which is commercial paper, and as such may be enforced in the courts of law, with all the rights incident to such paper; and the other, the mortgage with security on land, which may be enforced in the courts of equity, and is subject to the equities existing between the parties. The right of an assignee to set at defiance a defense which could be made against the assignor is an arbitrary statutory right, created for the convenience of commerce alone, and must rely upon the statute for its support, and is not fostered and encouraged by courts of equity."

This doctrine, so clearly enunciated by Chief Justice CATON, is re-asserted and enforced by Chief Justice WALKER in the case of *Walker* v. *Dement*, 42 Ill. 273. In delivering the opinion in this latter case he says, that while the purchaser of a note before maturity without notice will be protected against all defenses to the note, still, if it is secured by mortgage or other collateral security, the assignment will not cut off prior equities against the mortgage or collateral fund, although they might be secret and latent. There are many cases in which assignees have been protected against latent equities of third persons, whose rights and even names do not appear upon the face of the mortgage, and the reason

is, that it is the duty of the purchaser to inquire of the mortgagor if there be any reason why it should not be paid; but he should not be required to inquire of the whole world to see if some one has not a latent equity which might be interfered with by his purchase of the mortgage, as for instance a *cestui que trust.*

In the case of *Merry* v. *Sylburn*, 2 Johns. Ch. 441, Chancellor KENT said:

"It is a general and well-settled principle that the assignee of a *chose in action* takes it subject to the same equities it was subject to in the hands of the assignor. But this rule is generally understood to mean the equity residing in the original obligor and not an equity residing in some third person against the assignor." In *Westfall* v. *Jones*, 23 Barb. 10, the court said:

"Does the plaintiff, being a *bona fide* purchaser and assignee of the bond and mortgage, stand in any better condition than the person from whom he derived his title? It is a well-settled principle that the assignee of a chose in action takes it subject to all equities which existed against it in the hands of the assignor." The same rule is laid down in Pennsylvania in *Mott* v. *Clark*, 9 State, 399, and in *Prior* v. *Wood*, 31 Penn. St. It may be objected to these decisions, that the mortgage in each of the cases was given to secure a bond, and that the bond having no commercial character, the party taking an assignment would, as a matter of course, take the mortgage burdened with infirmities which the statute prescribes shall not apply to negotiable notes transferred before due.

These cases are made to rest on another and different ground, namely, that the proceeding was on the mortgage itself, and there being no express statutory provision authorizing the assignment of the mortgage. But it may be urged that the mortgage is accessory to the note, that it is attached to it, and being so attached, it is, and must remain, inseparable. This is true as long as both instruments remain in the hands of the mortgagor. But when he assigns the note there is in law a separation. The assignee can take his note

into a court of law and recover a judgment upon it, but he cannot take the mortgage there; he cannot claim the benefit of it there. He is confined simply to his remedy on the note. Whatever judgment he recovers is purely a personal one. He will not be heard to say that the maker of the note pledged a special fund, out of which the debt must be satisfied. The court could reply, and with reason, whatever your rights may be in equity, one thing is certain, there is no law authorizing your assignor to transfer to you the mortgage. It does not follow you into this court. How is it when he brings his action on the mortgage in a court of equity? Then the mortgage is the foundation of the suit, and the remedy sought is the foreclosure of the equity of redemption. The note is used to compute the amount; it has no other office to perform. The mortgage in one sense, and in an important one too, has a character of its own. If one holds a note, against which the statute of limitations has run, and also a mortgage or pledge of real or personal property to secure it, he cannot sue on the note, but he can take and hold possession of the property, and sell it if it be personal property, with proper precautions, and if real property, he can have a bill in equity to foreclose his mortgage, and if his lien fails to pay the whole of his debt, he loses the remainder, because he can have no action upon it, although he may have proper process founded upon the debt and security to establish his lien and make it available in the payment of his debt. A mortgage may be enforced so long as it is available, although the debt secured by it is barred by the statute of limitations. Parsons on Contracts, vol. 2, 379; 20 Mo. 482; Angell on Limitations, 77, 78. It is also well established that, if a legal tender is made of money due on a bond and mortgage to the mortgagee, or his assignee or attorney, which is refused, the land is discharged from the mortgage though the debt remains. *Jackson* v. *Bowers*, 18 Johns. 110; 6 Hill, 65; 21 Wend. 467; and 26 id. 541. Does not this indicate that the mortgage and the instrument which it secures have separate and independent characters? This is sufficient to

show that it has a character of its own. But it may be urged, if this had been an action at law on the note itself, that the assignee could not have been chargeable with equities or defenses, which might have existed against the same in the hands of the assignee or original payee, and of which the complainant was ignorant at the time of assignment, and that it being commercial paper he could have obtained judgment for the full amount expressed in the note, and on execution this same land described in the mortgage might have been levied on and sold to satisfy the same. Admitting this to be true, yet in this case the purchaser of the land under the sale would hold it subject to the mortgagor's right of redemption. *Thornton* v. *Pegg*, 24 Mo. 247. There is a reason why in an action on the note he would be entitled to recover the full amount, namely, a court of law cannot take cognizance of equities that in a court of chancery would not only be recognized but rigorously enforced. The books are full of cases where a judgment has been rendered in a law court against a defendant one day and the same judgment enjoined by a court of chancery the next.

It is true that the principles governing and controlling a court of chancery are as fixed and certain as are those which control a court of law, and one of those principles governing a court of chancery is, that he who invokes its equitable powers must be ready to do equity. But this discussion has already been protracted to a sufficient length. What was the equity of the mortgagor in this case? What relation did Jacob B. Carpenter sustain to the wheat and flour received by him as security in addition to the mortgage, and how far is the complainant affected thereby? We think it was a pledge. The contract of pledge is a bailment or delivery of goods and chattels of one man to another, to be holden as a security for the payment of a debt or the performance of an engagement, and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the debt is discharged or the engagement has been fulfilled. The con-

tract is to be distinguished from the contract of hypothecation by the transfer of the possession or the delivery of the thing intended to be charged to the creditor, and from the contract of mortgage by the absence of a transfer of the ownership and right of property thereof in the premises during the continuance of the trust. If the thing intended to be burdened with the debt or charge remains in the possession and under the disposition of the owner, there is no pledge. By a pledge, therefore, of the goods and chattels the right of possession is altered, but not the right of property. Was the wheat and flour in the possession and under the control of Jacob B. Carpenter? He had the receipt of the warehousemen for it. Mahala Longan could not have conveyed the same to any one freed and discharged from his lien upon it. Miller & Williams, the warehousemen, were liable to him, on their receipt, for the amount expended on it. If any one had carried away and converted the wheat to his own use, Carpenter could have maintained an action for it, and the production of the receipt in evidence would have been proof of his title. Part of this wheat and flour, while in the possession and under the control of Jacob B. Carpenter, and before the assignment of the note, was sold, and the money paid to Miller & Williams, his depositaries. He recognized them as his agents by accepting their receipt, and the money paid by them for the wheat and flour sold was equally under his control, and could have been collected by him. If he failed to apply this money on the payment of the note and mortgage, and allowed it to remain in their hands until it was dissipated and squandered, he must suffer the loss, not Mahala Longan, who had no right to the possession of it. And if, in an action by Jacob B. Carpenter, Mahala Longan would have been entitled to recoup the amount of money paid to Miller & Williams for the wheat pledged, under the rule we have announced in this opinion, his assignee stands in no better position, and this money, so paid, must operate as a satisfaction, *pro tanto*, of the note and mortgage. As to the wheat and flour that remained in

the hands of Miller & Williams at the time of the assignment of the note to the present complainant, we express no opinion further than to say, that it never passed to B. Platte Carpenter, and that, if any liability attaches to any one, it must be to Jacob B. Carpenter, and on his liability we purposely refrain from expressing any opinion.

For the failure of the court below to allow credit on the mortgage for the wheat sold prior to the assignment of the note, this case must be remanded and reversed. It is accordingly reversed, with costs, for further proceedings in accordance with this opinion.

HALLETT, C. J., dissenting. Mahala and Jesse B. Longan made their negotiable promissory note of date March 5, 1867, payable to J. B. Carpenter six months after date. To secure this note Mahala Longan mortgaged to J. B. Carpenter certain lands in Jefferson county, and the note and mortgage having been assigned to the appellee before the maturity of the note, this bill was filed to foreclose the mortgage.

The defense set up by the appellant in her answer is, that at the time the note and mortgage were given she pledged to J. B. Carpenter certain wheat and flour, and that at the maturity of the note she tendered the amount due upon it at the Colorado National Bank, where it was left for collection, and demanded the note and mortgage, as well as the wheat and flour.

The answer was put in without oath, the verification being waived by the complainant in his bill according to the statute, and therefore evidence is required to support its averments. In the first place it is to be observed, that the evidence does not support the allegation that the appellant gave to J. B. Carpenter the wheat and flour as security for the payment, but shows on the other hand, that this wheat and flour was pledged by William and Jesse B. Longan. It is true that William Longan testifies that the appellant gave the personalty as additional security, but this statement is overborne by the other testimony in the case. Upon the

whole testimony it appears that William and Jesse B. Longan were the owners of the flour and wheat, and at the time the note was made the property was in the warehouse of Williams & Miller, where it had been placed for safe-keeping. William and Jesse B. Longan had previously obtained a loan upon the same property, and as the greater part of the money obtained from Carpenter was to be applied to the payment of this pre-existing indebtedness, the same property was at first offered as security for the note in this case. This security being refused by Carpenter, the mortgage in this case, together with the pledge of the personal property, was offered as security for the note and accepted. Jesse B. Longan testifies that he gave the personalty to Carpenter as security for the note, and that the money was borrowed for himself and his brother. The whole testimony shows that Mahala Longan became a party to the transaction for the purpose of mortgaging her real estate to secure the payment of the money borrowed by her sons, that she was not the owner nor was she in possession of the personal property, and that the latter, if pledged at all, was pledged by the sons and not by the mother. Hence it is not true, as alleged in the answer, that the appellant gave to J. B. Carpenter personal property as security for this note, and the proof failing to support the allegation, the defense must be rejected. Gresley's Eq. Ev. 232.

Accepting these facts as if they were well pleaded, and assuming, what is by no means clear upon the evidence, that the amount due upon the note was tendered at its maturity, how was the appellant entitled to demand the possession of the personalty upon the payment of the note? Surely upon the extinguishment of the note the property would revert to the pledgors, William and Jesse B. Longan, and the appellant would be no more entitled to the possession then than before the pledge was made.

Again, the rule which makes the assignment of a mort gage subject to the equities existing between the mortgagor and mortgagee is expressly confined to such equities only, and cannot be extended to equities existing between the

mortgagee and third parties. *James* v. *Morey*, 2 Cowen, 297.

In this case the personalty was pledged by Wm. and Jesse B. Longan, and whatever their rights against J. B. Carpenter, the appellant is a stranger to them. This doctrine is recognized by the court in this case, but I do not perceive that any attempt has been made to apply it. It is true that there is evidence in the record tending to prove an agreement, respecting the wheat and flour, between the pledgors and the pledgee, to the effect that the property might be sold to the pledgors by the warehousemen and the proceeds applied to the payment of the note, and, also, that some of the property was sold according to this agreement. If J. B. Carpenter was responsible for the money thus received, probably this was a payment upon the note which, according to the view of my brethern, would inure to the benefit of the appellant. But conceding this, the appellant should have set up the payment in her answer. She has pleaded a tender of the whole amount due upon the note, and complains that the pledged property and the note and mortgage were not surrendered to her when the tender was made, and to this defense she must be confined. If, under such an answer, a party may show payment, every other defense is equally open, and the rule which requires correspondence between proof and allegation may as well be annulled.

I come now to consider, whether the innocent holder of negotiable paper secured by mortgage may recover upon the mortgage the amount due upon the note in his hands, or is limited to the amount which might be recovered by the mortgagee if the suit were instituted by him. Upon this question there is some conflict of opinion, but I think that the weight of authority and the better reason are opposed to the views of my brethren in this case, and therefore I reluctantly proclaim my dissent from the opinion of the court.

The nature of a mortgage and its relations to the indebtedness it is intended to secure are pretty well understood at

this day, and do not demand much discussion. In *Martin* v. *Mowlin*, 2 Burr, 978, Lord MANSFIELD said:

"A mortgage is a charge upon the land, and whatever will give the money will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it."

So, also, KENT, C. J., in *Jackson* v. *Willard*, 4 Johns. 43:

"Until foreclosure, or, at least, until possession taken, the mortgage remains in the light of a chose in action. It is but an incident to the debt, and in reason and propriety it cannot and ought not to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold its interest at the will and disposal of the creditor who holds the bond. *Accessorium non ducit sed sequiter principale.*"

To the same effect are all the authorities and no one can now be found to question the doctrine that a mortgage is a mere incident to the indebtedness it is intended to secure, inseparable from it and incapable of existence without it. It is a truism of the law that a mortgage is a security for indebtedness accompanying the latter through all hands, and ultimately sharing the same fate. This rule which identifies the security with the indebtedness in my opinion requires, that the remedy upon the security shall be co-extensive with the demand. When this is denied the mortgage is divested of its character as a security to the extent of such denial. By the mortgage contract a lien is given upon property for the payment of certain indebtedness, and if the indebtedness be withdrawn from the lien, or if the existence of the lien be denied for causes *dehors* the mortgage, that instrument is divested of its essential quality in the face of its express provisions. That is no security for indebtedness which will not come up to the point of contributing to its payment, and a mortgage intrinsically good, which falls short of the measure of its principal, is a paradox unknown to the law. To illustrate, let us look for

a moment at the present case. A negotiable note secured by mortgage was indorsed to appellee before maturity upon a valuable consideration. It does not appear that the pledged property was delivered to appellee, or that he had any knowledge of it, so that no notice need be taken of that feature of the case. Neither law nor equity will deny to the appellee, as a *bona fide* holder for value, the full amount of the note when that instrument is presented. But it is said, that the action being to foreclose the mortgage, the amount of the note must be diminished by the sum received by the payee or his agents before the assignment to appellee. The mortgage is, in itself, valid and effectual, according to its legal character as a security for the indebtedness evidenced by the note. The note is intrinsically good, and, in the hands of the appellee, constitutes a demand against the appellant, for the amount expressed upon its face. Each instrument is perfect in itself, the one as a demand against appellant, the other as security for that demand, and yet when united, and a remedy to enforce the lien is sought, the security of the mortgage is denied as to a portion of that demand. In other words, the mortgage has ceased to be a security as to part of the indebtedness evidenced by the note, its express provisions to the contrary notwithstanding. It appears to me that the mortgage having been made as a security for the payment of the note, it ought to stand as a security for the whole note, extinguishable only upon payment of the whole amount recoverable upon it. Any other view is opposed to the rule which unites the mortgage to the indebtedness inseparably and gives them a common existence.

In this connection I will ask attention to the language of the supreme court of Wisconsin upon this subject.

"The doctrine that an assignee can enforce the mortgage for no more than is justly and actually due between the mortgagor and the mortgagee had its origin at a time when the practice of giving mortgages as collateral security for the payment of negotiable paper was wholly unknown, and was made to rest upon the ground that such would be the

rule adopted in a suit at law, upon the covenant or bond to which the mortgage was collateral, and the assignee should stand no better in equity than at law. The reason of the rule being, that because, in a suit at law for the use of the assignee upon the bond or covenant to collect the debt, a recovery cannot be had for a greater sum than is actually due from the mortgagor to the mortgagee, and therefore no more shall be recovered in equity in an action to foreclose the mortgage, or that the parties as to rights and remedies shall stand upon the same footing in both courts; it follows, as a logical conclusion, that when the nature of the instrument evidencing the debt and the circumstances of the transfer are such, that in a suit at law upon it against the mortgagor the assignee can enforce its payment regardless of any equities existing between the mortgagor and mortgagee. he should have the same rights and remedy in equitv. The reason of the rule ceasing in the case of negotiable securities transferred before maturity and without notice. the rule also ceases. The debt is the principal thing, the mortgage the incident, the transfer of the debt carries with it the mortgage. It is the debt which gives character to the mortgage and fixes the rights and remedies of the parties under it, and not the mortgage which determines the nature of the debt." *Croft* v. *Bunster*, 9 Wis. 509. See, also, *Dutton* v. *Joes*, 5 Mich. 519; *Reeves* v. *Scully*, Walker's Ch. 248.

Another consideration of great weight ought not to pass unnoticed. It is conceded that the appellee may recover in an action at law, upon this note, that portion of his demand which is denied to him in this proceeding. It was said by HOSMER, C. J., in *Clark* v. *Beach*, 6 Conn. 159: "The equitable doctrine concerning the rights of mortgagor and mortgagee has gradually been naturalized in the common-law code, and by the adoption of principles long established in chancery, and tenaciously adhered to, the suitors are not driven from one bar by increased litigation and expense to obtain infallible relief at another."

The policy of the law here defined has not, I think, been

heeded in this case. The appellant is protected from the payment of a portion of the appellee's demand, to which she must hereafter respond in a court of law, while the appellee is driven from this bar by increased litigation and expense to obtain infallible relief at another. The case of *Olds* v. *Cummings*, 31 Ill. 188, is the authority upon which the decision of this court is based, and that case is grounded upon the assumption that a foreclosure suit is brought upon a mortgage only. The court in that case say:

"The note itself, though secured by a mortgage, is still commercial paper, and when the remedy is sought upon that, all the rights incident to commercial paper will be enforced in the courts of law. But when the remedy is sought through the medium of the mortgage, when that is the foundation of the suit, and the note is merely used as an incident to ascertain the amount due upon the mortgage, then the courts of equity to which resort is had must pause and look deeper into the transaction, and see if there be any equitable reason why it should not be enforced."

Upon this I submit that a foreclosure is founded upon the indebtedness as well as the mortgage. A court of equity will not, and in the nature of things cannot, permit a mortgagee to recover unless he is the holder of the indebtedness secured by the mortgage. 1 Hill. on Mort., ch. 11, § 5.

Whether the proceeding be at law or in equity, the indebtedness is the principal thing, for both remedies are designed to enforce payment of the money. I concede that the remedy at law is upon the note alone, but it is equally plain that the suit in equity is founded upon the note and mortgage, and that each is essential to the right of recovery. The indebtedness is the incumbrance and the mortgage is the means by which the incumbrance is attached to the estate. If either be removed, there is nothing remaining upon which the court can act. In a proceeding to foreclose a mortgage it is the duty of the court to ascertain the amount of the indebtedness, as well as to enforce the lien upon the mortgaged property for its payment, and while the mortgage will show the lien it is rarely evidence of the

indebtedness. Sometimes a covenant for the payment of the money is inserted in the mortgage, but usually a bond, note or other separate instrument is executed for the purpose of showing the amount of the indebtedness. Where the indebtedness is evidenced by a separate instrument a court of equity is as much bound to give effect to that instrument as to the mortgage. In this case the note is evidence of the amount of the indebtedness just as the mortgage is evidence of a lien upon certain property for the payment of that indebtedness, and the court is bound to give effect to the first as well as the second. The note is the legal and unquestionable evidence of the indebtedness as the mortgage is evidence of the lien, and each according to its office determines the rights of the parties. It is impossible to say that there is any thing due upon the mortgage disconnected from the note for the reason that the note alone determines the amount of the indebtedness.

The supreme court of Illinois say that the note is "merely used as an incident to ascertain the amount due upon the mortgage," but it is plain that no such use was made of the note in that case. The note called for the amount expressed upon its face, but the court refused to recognize the demand. The mortgage referred to the note as the standard of indebtedness, but the court rejected the note in violation of the express language of the mortgage. And this was done for the avowed purpose of protecting the mortgagor from making payment to the innocent holder of negotiable paper. I am not able to perceive that the former occupies a higher position in a court of equity than the latter, or that there is any reason for setting aside the rules of law applicable to commercial paper in cases of this kind.

The opinion of that court as well as that announced by this court is open to other criticism, but I think that I have shown that the ruling of the district court was correct, and that the decree of that court should be affirmed.

MACHETTE v. WANLESS.

1	225
2	170
2	481
4	341
1	225
15	133
16	587

VERDICT *on issues in trover and replevin — sufficiency.* Issues upon plea of *non-detinet* and property in defendant in replevin, and upon plea of not guilty in trover, are not determined by a verdict of guilty.

CONSTRUCTION OF MORTGAGE *must be such as will give effect to the whole instrument.* A mortgage in terms defeasible upon payment of a note for $100, but which, by another clause, appears to have been intended as a security for past indebtedness, will be construed so as to bring the clause relating to past indebtedness within the terms of the defeasance.

MORTGAGE — *description of indebtedness.* A mortgage given to secure all past indebtedness due and owing from the mortgagor to the mortgagee contains a sufficient description of the indebtedness.

PRACTICE — *objection to evidence must be made at the trial.* Objections to evidence cannot be presented for the first time in this court.

REPLEVIN BY MORTGAGEE *of chattels — evidence of indebtedness.* A mortgagee of chattels may proceed against the mortgaged property while he holds any portion of the indebtedness secured by the mortgage, and in replevin for such chattels it is sufficient for him to show that he holds some portion of the indebtedness secured by the mortgage.

In an action of replevin by a mortgagee to recover possession of the chattels mortgaged, the defendant cannot defeat the action by showing that a portion of the indebtedness mentioned in the mortgage has been paid.

REPLEVIN — *defense arising after suit brought.* In replevin by a mortgagee to recover possession of the mortgaged chattels, the defendant cannot defeat the action by showing that a portion of the indebtedness was paid after suit brought.

CHATTEL MORTGAGE *must be executed according to statute.* A chattel mortgage, which does not provide that the property shall remain in the possession of the mortgagor, and which is not executed according to the statute (Rev. Stat., chap. 14, 102), cannot be received in evidence.

Appeal from District Court, Arapahoe County.

AT the trial, George F. Wanless testified: That he was agent for the plaintiff below, and authorized to make advances to one Goff, who occupied plaintiff's farm; that he took a mortgage from Goff to the plaintiff on one-half of Goff's crop, to secure such advances; that, on going to the plaintiff's farm one day, he found the defendant below removing the grain; that he told defendant of the mortgage to plaintiff, and claimed the grain and forbid the removal of it; that Machette, the defendant, answered, that he did

not intend to give up the grain, and thereafter secreted it, and refused to tell where it was; that the grain was found and replevied under the writ; that Machette stated that he was aware of plaintiff's mortgage; that Goff told witness, about a week before the grain was threshed, that he would not thresh for some weeks yet; that the grain was grown upon plaintiff's farm in the summer of 1867; that the advances made for plaintiff by witness were made at different times; that the last advance was $100; was made in June, 1867.

Cross-examination: Witness identified a note taken by him from Goff at the time the mortgage was executed, and stated that it was paid at maturity by Machette, the defendant. Witness also stated: "I had advanced Goff money before that, horses, etc. I had made advances and so had my brother, and I took this mortgage to secure all of his indebtedness to my brother. I did not then know what or how much my brother had advanced, or how much I had advanced in all, and therefore only specified particularly this note in the mortgage; Machette paid me this note on the day it was due, I think it was after this suit was brought."

Plaintiff then offered a chattel mortgage from Goff to himself, dated July 6, A. D. 1867, and two notes from Goff to himself, one dated December 1, 1866, for $616, payable one day after date, another dated October 15, A. D. 1866, for $500, payable eight months after date. The consideration expressed in the mortgage was $500, and the defeasance was as follows:

"Provided, nevertheless, that if the said party of the first part, his heirs, executors or administrators, shall well and truly pay to the party of the second part, his executors, administrators and assigns, for the redemption of the above bargained goods and chattels, the just and full sum of $100, on or before the fifteenth day of September, A. D. 1867, with interest on the same, according to the tenor and effect of a certain promissory note, given by the said party of the first part to the said party of the second part, bearing even

date with this deed, then these presents to be void, otherwise to remain in full force and virtue, and to secure all past indebtedness due and owing from the said first party to the said second party, said indebtedness to be paid on or before said fifteenth day of September, A. D. 1867."

The defendant admitted the execution of the notes and mortgage, but objected generally to the introduction of the notes and to the mortgage on the ground that it was fraudulent and invalid for uncertainty. But the court allowed them to be read in evidence. The defendant below proved the execution of a mortgage from Goff to him, and also a note of $1,500, dated June 6, 1867, payable thirty days after date. The mortgage was of the same date, and for the undivided one-half of the crop then growing upon plaintiff's ranche. This instrument did not contain any provision as to the possession of the property by the mortgagor, nor was it acknowledged in the form prescribed by the statute, relating to chattel mortgages. Upon plaintiff's objection the note and mortgage were excluded. The defendant also offered the $100 note, mentioned in the mortgage from Goff to plaintiff, and upon plaintiff's objection the court refused to receive it. The defendant also offered a power of attorney from Goff to him, authorizing him to pay the $100 note and obtain a release of plaintiff's mortgage. On plaintiff's objection this was excluded also. The verdict of the jury was, they find the said defendant guilty, and assess the said plaintiff's damages on occasion of the premises at five cents.

Messrs. CHARLES & ELBERT and Mr. GEORGE W. PURKINS, for appellant.

Mr. ALFRED SAYRE and Mr. M. BENEDICT, for appellee.

HALLETT, C. J. The declaration in this cause contains a count in replevin and a count in trover. To the count in replevin *non detinet* and property in Machette was pleaded, and to the count in trover the plea was not guilty. Issues were joined upon these pleas, and upon trial thereof the jury returned a verdict of guilty, and awarded five cents

damages to the plaintiff below. 'It is impossible to say that these issues were determined by this verdict. Whether the jury found the defendants guilty of the detention charged in the first count, or the conversion charged in the second count, can only be conjectured, and the verdict is entirely silent as to the ownership of the property. In *Patterson* v. *United States*, 2 Wheat. 221, it is said: "Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue, and although the court in which the cause is tried may give form to a general finding so as to make it harmonize with the issue, yet if it appears to the court, or the appellate court, that the finding is different from the issue, or is confined to part only of the matter in issue, no judgment can be rendered upon the verdict."

It is hardly necessary to add, that according to this rule this judgment cannot stand.

Other questions are presented which will probably arise upon another trial of the cause, and therefore it is necessary to refer to them briefly.

The mortgage from Goff to Wanless, although in terms defeasible upon payment of the $100 note, seems to have been intended as a security for all indebtedness then existing between the parties. The clause relating to past indebtedness must be brought within the terms of the defeasance in order to make it effectual, and this appears to have been the intention of the parties. This construction will give effect to every part of the instrument, while that urged by the appellant requires the provision respecting past indebtedness to be rejected, and the law will indulge the first construction rather than the last.

As to the description of the indebtedness, the case of *Insurance Company* v. *Brown*, 11 Mich. 266, is an authority.

In that case it was held that a mortgage conditioned for the payment of all sums due and to become due was sufficiently certain, and the opinion of the court appears to be well sustained by other authorities.

If the appellee had been called upon to show that the notes given in evidence were covered by the mortgage, the

court below would, doubtless, have required him to furnish such proof, since the mortgage does not contain a specific description of the indebtedness designed to be secured. But the appellant's objection appears to have been directed against the mortgage, and it does not appear that any question was made in the court below respecting the connection or want of connection between the notes and mortgage. So, also, as to the objection that it does not appear that the instrument was recorded in the office of the county recorder. It does not appear to have been presented to the court below, and cannot be presented for the first time in this court.

In answer to the objection that the $100 note was not offered by the appellee together with the chattel mortgage, it is sufficient to say, that a portion of the indebtedness secured by the mortgage was offered and received. Of course, a mortgage valid and effectual to secure the whole of the indebtedness described in it, is valid and effectual as to every portion of such indebtedness, and, while the mortgagee holds any portion of the indebtedness secured by the mortgage, he is entitled to proceed against the mortgaged property. Perhaps this statement would require some modification if applied to a case where a mortgagee of chattels has assigned a portion of the indebtedness secured in his mortgage, and his assignee has obtained possession of the mortgaged chattels. But the appellant does not occupy the position of an assignee of the $100 note. He claims to have taken it up on behalf of Goff, the maker, and is aggrieved that the court below would not permit him to show this fact. Furthermore, at the time the property was replevied, the note had not been paid, and, therefore, appellant was not then in possession of it, either as assignee or otherwise. Upon the evidence in this case, it certainly was sufficient for appellee to show, that he held a part of the indebtedness secured by the mortgage, and we do not see that appellant could defeat a recovery by showing that he did not hold all of the indebtedness. Although there was a count in trover in the declaration,

there was no attempt to charge defendants below with more property than was obtained upon the writ of replevin, and, therefore, we may say, that the action was solely to recover possession of chattels. We have seen, that appellee was only required to show some indebtedness from Goff to him under the mortgage, in order to support his right to the possession of the mortgaged chattels, and, therefore, the refusal of the court to allow appellant to show that the $100 note had been paid was not erroneous.

As to the mortgage from Goff to appellant, it was not executed according to the statute, and, therefore, it was properly excluded. *Hunt* v. *Bullock*, 23 Ill. 320.

We do not perceive that any other questions presented in this record will necessarily arise upon another trial of the cause, and, therefore, this discussion will not be extended further.

The judgment of the district court is reversed and the cause remanded for a new trial.

Reversed.

---

1 230
5a 125

1 230
11a 332
11a 336

WESTERN UNION TELEGRAPH COMPANY *v.* GRAHAM.

REGULATIONS BY TELEGRAPH COMPANY *respecting their business.* Telegraph companies may make reasonable regulations concerning their business, but cannot by such rules relieve themselves from responsibility for the negligence of their servants.

REGULATION *not applicable.* That the plaintiff did not cause a message to be repeated as required by a regulation of the company is no defense to an action for a failure to deliver the message after it was received at the office to which it was addressed.

MEASURE OF DAMAGES *in action for non-delivery of telegram.* In an action against a telegraph company to recover damages for the non-delivery of a telegram, in which the plaintiff requested his agents at Nebraska City to "ship oil soon possible," the plaintiff cannot recover the profits which he might have made on the oil if the message had been delivered and the oil sent in due time.

In such action the plaintiff may recover the money paid by him for transmitting the message, the advance in the price of freight, and his expenses incurred by reason of the failure of the defendant to fulfill the contract.

Error to District Court, Arapahoe County.

HALLETT, C. J., did not participate in the decision.

MR. ALFRED SAYRE, for plaintiff in error.

MESSRS. CHARLES & ELBERT, for defendant in error.

BELFORD, J. The marked ability which has characterized the argument of this case makes it important to examine with great care the principles involved. The declaration contains three counts. It is averred that the plaintiff, on the 5th day of December, 1864, employed the defendant to transmit from Denver, in Colorado, and deliver to Ashton and Tait, in Nebraska City, in Nebraska, the following message:

"DENVER, *December* 5, 1864.

"ASHTON & TAIT, *Nebraska City:*

"Ship oil soon as possible, at very best rates you can.

"WILLIAM GRAHAM."

It is further alleged that, in consideration of the sum of $5.00 then paid, the defendant accepted and agreed to deliver the same, but that, by reason of the unskillfulness, negligence, and want of care of the servants and employees of the company, the message was not transmitted and delivered; by means whereof the said Ashton and Tait did not ship the oil as requested, and the plaintiff was compelled to pay higher rates of freight on the same, amounting to the sum of $500, and also that the plaintiff lost great gains and profits by the delay thus caused in not shipping said oil, amounting to the sum of $1,500, and was otherwise put to great expense and incurred great loss and damage.

The defendants, for answer, plead the general issue, and four special pleas. In the special pleas it was alleged, that at the time of the delivery of the several telegraphic messages, in the several counts of the declaration mentioned, the plaintiff was notified and informed that in order to guard against mistakes in the transmission of messages over the

lines of the defendants from Denver to Nebraska City, every message of importance ought to be repeated by being sent back from the station at which it is to be received to the station from which it is originally sent, and that the defendant would charge fifty per cent more for repeating each message than for sending or transmitting such message without repeating the same; and that, while the defendant would use every precaution to insure correctness, the said defendant would not be responsible to the plaintiff or to any other person for mistakes or delays in the transmission or delivery of repeated messages, beyond an amount exceeding five hundred times the amount paid for sending the message, and that the said defendant would not be responsible for mistakes or delays arising from interruptions in the working of the telegraph of the said defendants, nor for any mistake or omission of any other company over whose lines a message should be sent to reach the place of destination. It is further alleged that the plaintiff, well knowing the premises, did not, at the time of delivering the messages, in the declaration mentioned, to the defendant, nor at any time before or since, request the defendant to repeat the messages by sending the same back from Nebraska City to Denver, nor did the plaintiff pay or offer to pay to the defendants the sum or price charged by the said defendants for repeating the said several telegraphic messages. To these several special pleas a demurrer was filed and sustained. The defendant went to trial on the general issue, and the jury returned a verdict for the plaintiff, and assessed his damages at $1,039.69. The motion for a new trial having been overruled, the cause comes here.

The first error assigned is the sustaining of the demurrer to the special pleas.

It is claimed by the plaintiff in error that Graham, having subscribed to the conditions printed on the back of the paper on which the dispatch was written, is not only chargeable with notice of them, but that his right to recover is limited thereby. It is further insisted that, not having requested the defendant to repeat the message, he thereby

released the company from liability. It is no longer a question of doubt that a telegraph company has the right to make reasonable rules and regulations for the proper conducting of its ordinary telegraphing business, and this right has been recognized by many of the States by statutory enactments, and in others by decisions of their courts, but while this is the case, the doctrine has nowhere been carried to the length of exempting them from all responsibility for a want of fidelity and care in the exercise of the employment which they undertake to prosecute. There are duties they owe the public arising out of the nature of their employment which it would be impolitic and inexpedient to suffer them to diminish or evade. Among these duties may be mentioned the obligation to employ competent and skillful operators and other agents and servants, in all respects competent for the discharge of their particular duties; and further, to see that they not only possess such skill, but that it is continually applied, in the particular business in which they are engaged. They cannot refuse to receive and forward messages, nor select the persons for whom they will act. They must send for every person who may apply at a uniform rule without any undue preference, and according to established rules and regulations applicable to all alike. In the case of *Ellis* v. *American Telegraph Company*, 13 Allen, 234, BIGELOW, C. J., says: "There can be no doubt that in the ordinary employments and occupations of life men are bound to the use of due and reasonable care, and are liable for the consequences of carelessness or negligence in the conduct of their business to those sustaining loss or damage thereby. We can see no reason why this rule is not applicable to the business of transmitting messages by telegraph. But the rule does not operate so as to prevent parties from prescribing reasonable rules and regulations for the management of the business, or establishing special stipulations for the performance of services, which, if made known to those with whom they deal, and directly or by implication assented to by them, will operate to abridge their general liability at common

law, and to protect them from being held responsible for unusual or peculiar hazards which are incident to particular kinds of business. Of course a party cannot in such way protect himself against the consequences of his own fraud, or gross negligence, or the fraud or gross negligence of his servants or agents, nor can he escape all liability or responsibility in the performance of the service or duty which he undertakes. Nor can there be any difficulty or danger in the application of this principle so long as it is kept within a proper limit. That limit is found by requiring in all cases that the conditions and regulations by which a party seeks to limit his liability in the conduct of his business shall be reasonable. Such only, by the rules of law, can a party be permitted to prescribe, and to none other can those who deal with them be held to yield their assent."

This brings us to the question, whether the rule relied on by the defendants in the special pleas, and which is set up in defense of the plaintiff's claim, is a just and reasonable one, and such as they have a right to prescribe, and by which the plaintiff was bound.

It has been remarked by an eminent lawyer, "that when rules and regulations are in derogation of common right, or are intended to restrict and limit liabilities to which the company would otherwise be subject, by reason of the duties imposed upon it by law, or the nature of its engagement, the validity of such rules and regulations is a question of law." Accepting this as true, how stands the rule relied upon in the special plea? The gist of the action is the failure to deliver the message. The complaint is not that the message was incorrectly sent or that it was inaccurately taken off the wires at Nebraska City. If this was the gravamen of the action, we might hold with the Kentucky and Massachusetts courts, that it was the duty of the plaintiff to insure its accuracy by having it repeated. But how could the failure to deliver the message be avoided by paying for having it repeated? Can it be said that the operator at the other end of the line could insure the safe delivery of a message by repeating, when the negligence which

occasioned the failure occurred after the receipt of the message? The object of repeating a message is to correct errors and not to avoid delays in delivering it. After transmission an incorrect message could be sent out and delivered as speedily as if it had been verified and proved to be perfectly accurate. Delays in the delivery of a message result from causes altogether different from those which produce mistakes in transmission, and it is reasonable that rules of limitation or exemption should be adapted to the nature of the case. Scott and Jarnigan on the Law of Telegraphs, § 113. A message may be correctly transmitted from one point to another, may be correctly taken off the line, and the agent of the company may, through inattention, fail to deliver it to the party to whom it is directed. It would hardly be contended that in this case the company could shield itself under the condition that the party sending the message failed to pay for having it repeated. The mere fact of having it repeated could not have insured its delivery. The failure to deliver is not caused by imperfection of instruments and appliances, by electrical changes, or by a break of the line at an intermediate point, but by the negligence of the operator, and against this inattention and want of care these rules and regulations cannot provide. To support the reasonableness of the conditions attached to the message, our attention has been called to the case of *Ellis* v. *American Telegraph Company*, noticed above. The counsel citing this case must have overlooked the remarks of the chief justice, on page 238: "It is hardly necessary to say that the question, whether the mistake or error in the dispatch would have been prevented or corrected by the repetition of the message, in conformity to the regulations established by the defendants, does not appear to have arisen at the trial. Whether it would have done so was a question of fact for the jury. *Of course the defendants would be liable for any negligence causing damage, which would not have been prevented by a compliance with these rules.*"

Until the plaintiff in error can show that the failure to

transmit and deliver the message could have been prevented by having it repeated, the above case can be of little avail to him. The next authority relied on is that of *Camp* v. *Western Union Telegraph Company*, 1 Metc. (Ky.) 166. In this case the company, by way of defense, relied upon a notice of the terms and conditions on which messages were received by it for transmission, and which are the same as those relied on here. SIMPSON, Judge, says: "There is no allegation in the plaintiff's petition that the mistake was occasioned by negligence, or was the result of incompetency or want of proper skill on the part of the agents who were employed by the company to act as operatives in the sending and receiving of dispatches; *but the failure of the company to comply with its contract to transmit the message correctly is alone relied upon as the foundation of the plaintiff's right to a recovery in the action.*" It will be observed that the case at bar and the case cited differ in other particulars. Here the plaintiff charges that failure to transmit and deliver the message was occasioned by "the carelessness, negligence and want of skill of the defendants and their agents, and through want of due care and attention to their business." Here the act complained of is the failure to deliver the message, while in the case cited the message was transmitted and delivered, but there was a mistake made in the tenor of the dispatch, making it read sixteen cents a gallon instead of fifteen cents, as written by the sender. While we hold that it is competent for the company to provide by rules and regulations against the unforeseen disarrangement of electrical apparatus and the imperfection necessarily incident to the transmission of signs and words by electricity, yet it must be conceded that these forces or accidents do not affect the ability of the company to deliver the message to the party addressed, after it has been taken off the wires and reduced to writing. What is needed to secure delivery is fidelity, and to this the company is bound in all messages. In the case of *Birney* v. *New York and Washington Telegraph Company*, 18 Md. 341, 342, the plaintiff delivered to the com-

pany's agent a message for transmission, which was wholly forgotten by the agent, and he neglected to send it at all. There was no repeating price paid by the plaintiff. It was held by the court that the company's notice, with regard to the repetition of messages, would not apply to a case of neglect, when no effort was made to put a message upon its transit. Much has been said about the peculiar hazards to which telegraph companies are exposed. It is said that "the operating apparatus of the telegraph leaves no record of the work done at the place from which it is transmitted, and that, therefore, there is peculiar liability to error in the non-transmission and transmission of dispatches." This is all true, and courts and legislatures have been liberal in allowing companies to provide against such risks as arise out of atmospheric influences and kindred causes. At this point they have properly stopped. To permit them to contract against their own negligence would be to arm them with a most dangerous power, one, indeed, that would leave the public almost entirely remediless. It must be borne in mind that the public have but little choice in the selection of the company which is to perform the desired service. They do not select their agents or employees, nor can they remove them. They are bound to take the company as they find it, and to commit to these agents their messages, however valuable they may be. Such being the case, public policy as well as commercial necessity require that companies engaged in telegraphy should be held to a high degree of responsibility. I have thus far examined this case on the pleadings without alluding to the evidence elicited on the trial, and am of the opinion that the court below committed no error in sustaining the demurrer to the special pleas. Another question equally important remains for decision. On the trial below the court permitted the plaintiff, over the objection of the defendant, to introduce evidence of the price of coal oil in Denver, in December, 1864, and in January, February and March, 1865.

The introduction of this evidence was, doubtless, permitted on the ground that the plaintiff had a right to recover

damages for the loss of profits he might have made, had the dispatch been delivered to Ashton and Tait; and the oil been shipped by them and reached Denver in January or February. It is claimed by the plaintiff in error that the court also erred in giving the following instruction: "If the jury believe from the evidence that the defendant made an effort, in good faith, to transmit the dispatch given in evidence, and that the same was transmitted from Denver to Nebraska City, but that the dispatch was not delivered to Ashton and Tait, by reason of the carrier of the defendant depositing the same in the post-office at Nebraska City, then the jury are instructed that the defendant was not guilty of willful neglect or negligence, and the plaintiff is not entitled to exemplary damages or "smart money," but is only entitled to such reasonable damages as he sustained by the difference in freight, and the difference in price for which he sold his oil, and the price for which he might have sold it had the dispatch been delivered in time and the oil shipped at the next opportunity, that Ashton and Tait had to ship the oil after they should have received the dispatch." The plaintiff in error rests his objection to the introduction of the evidence above referred to, on the ground that the plaintiff's declaration contained no special averment of the loss of profits. In an action for refusing to let a lessee into possession, the plaintiff gave evidence of injury to his wife's business as a milliner, without having averred it specially; but the court held it admissible under the general allegation of damage, as going to show that "the plaintiff had sustained inconvenience." *Ward* v. *Smith*, 11 Price, 19; see, also, *Shepard* v. *Milwaukee Gas Company*, 15 Wis. 327. Before proceeding to discuss the right of the plaintiff to recover damages for loss of profits, it is proper to remark that neither the message nor declaration discloses the kind of oil that was to be shipped, nor its quantity nor quality, nor where it was at the date of the dispatch, nor for what purpose such shipment was to be made, nor whether such oil was intended for sale or for use, nor at what point the profits were lost. For any thing that appears in the declara-

tion it might have been hair oil, fish oil, or wizard oil. The element of certainty has been left out. True, the evidence shows that the plaintiff had on deposit with Ashton and Tait, as his forwarding agents, sixty-nine boxes of coal oil, but nothing of this kind appears in the declaration. Under the general averment, that the plaintiff lost profits on oil, it is claimed that the company should come prepared to dispute at the trial the value of any kind and any quantity of oil, at any place, and at any time. Under the ruling of the court below, the plaintiff could have as readily recovered for loss of profits on olive oil, as coal oil; for the profits of ten thousand gallons of oil, as for the profits on one. The defendant might have come prepared with testimony as to the value and quantity of one kind of oil, and yet have been surprised by an inquiry as to another kind or quantity. "A chief object of formal written pleadings is, to apprise the opposite party of the real cause of complaint against him, so that he may in like manner interpose the proper answer on his part, and that on the trial he may not be taken by surprise; this requires that the injury complained of should be stated with such fullness and certainty in the declaration as to leave no reasonable doubt of the particular transaction on which the plaintiff relies, and which he intends to prove to establish his right of action. These are common-place principles and apply to every pleading which is required to be special in its nature." *Relyea* v. *Drew*, 1 Denio, 563.

But, granting that the declaration was sufficiently specific in all these points, was the plaintiff entitled to recover damages for the loss of profits he might have made had the dispatch been delivered, and the oil been sent and received in Denver, and sold? In the case of *Staats* v. *Executors of Ten Eyck*, 3 Caines, 116, LIVINGSTON, J., says: "The safest general rule in all actions on contracts is to limit the recovery as much as possible to an indemnity for actual injury sustained without regard to the profits, which the plaintiff has failed to make, unless it shall clearly appear from the agreement that the acquisition of certain profits

depended on the defendant's punctual performance, and that he had assumed to make good such a loss also." To the same effect is *Thompson* v. *Shattuck*, 2 Metc. 618. In the case of *Freeman* v. *Clute*, 3 Barb. 426, HARRIS, J., says: "The defendants insist that if liable for consequential damages at all, they are only liable for such expenses as were actually incurred by the plaintiff in attempting to put the machinery in operation, and such actual loss as he had sustained in using the defective machinery; while on the other hand the plaintiff claims that he is entitled to recover, as consequential damages, the profits he could have made in the manufacture of oil had the machinery been complete and put up within the time limited. I agree with the counsel for the plaintiff in the general rule for which he contends, that the party complaining of the breach of an executory contract is entitled to indemnity for the loss which the non-performance of the obligation by the other party has occasioned him, and for the gain of which it has deprived him. But the gain contemplated by this rule is only that which is the direct and immediate fruit of the contract, such gain may as properly be regarded in estimating the damages resulting from a failure to perform a contract as any actual loss the party may sustain. But even the civil-law rule, which is more liberal than the common-law, in the measure of damages for the violation of an executory contract, confines the allowance for the loss of profits to the particular thing which is the object of the contract, and does not include such loss of profits as may have been incidentally occasioned in respect to his other affairs. I cannot agree with the counsel for the plaintiff that the estimated profits upon the manufacture of a specified quantity of flax seed into linseed oil constitutes a legitimate item of damages against the defendants; such profits are entirely too speculative and uncertain to make them a measure of damages."

The same rule is laid down in *Blanchard* v. *Ely*, 21 Wend. 342. In the case of *Driggs* v. *Dwight*, 17 Wend. 71, and *Millers* v. *The Mariners' Church*, 7 Greenl. 51, it was held that the plaintiffs were entitled to recover the

expenses actually incurred in their business *as a consequence* of the failure of the defendants to perform their contract, but denied their right to recover damages for profits, which they claimed they might have made. Mr. Justice STORY, in the case of *The Schooner Lively*, 1 Gallis. 315, commenting on this subject, says: "Independent, however, of all authority, I am satisfied upon principle that an allowance of damages upon the basis of a calculation of profits is inadmissible. The rule would be in the highest degree injurious to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets to an exactness in point of time and value which would sometimes present embarrassing obstacles. Much would depend on the length of the voyage and the season of the arrival. After all it would be a calculation upon conjectures and not upon facts." In the case of *Griffin* v. *Colver*, 16 N. Y. 490, the earlier New York decisions are reviewed with great care, and the conclusion reached is that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. They exclude only uncertain and contingent profits, not such as, being the immediate and necessary result of the breach of contract, may be fairly supposed to have entered into the contemplation of the parties when they made it, and are capable of being definitely ascertained by reference to established market rates. POTHIER says: "In general, the parties are deemed to have contemplated only the damages and injury which the creditor might suffer from the non-performance of the obligations in respect to the particular thing which is the object of it, and not such as may have been accidentally occasioned thereby in respect to his other affairs. This rule, however, applies only to cases where, by reason of special circumstances, having no necessary connection with the contract broken, damages are sustained which would not ordinarily or naturally flow from

such breach; as when a party is prevented by the breach of one contract from availing himself of some other collateral and independent contract entered into with other parties, or from performing some act in relation to his own business, not necessarily connected with the agreement. An instance of the latter kind is, when a canon of the church, by reason of the non-delivery of a horse pursuant to agreement, was prevented from arriving at his residence in time to collect his tithes. In such cases the damages sustained are disallowed, not because they are merely consequential or remote, but because they cannot be fairly considered as having been within the contemplation of the parties at the time of entering into the contract." After examining at great length the various decisions on the subject, SELDEN, J., remarks: "From these authorities and principles it is clear that the defendants were not entitled to measure their damages by estimating what they might have earned by the use of the engine and their other machinery, had the contract been complied with. Nearly every element entering into such a computation would have been of that uncertain character which has uniformly prevented a recovery for speculative profits."

In the case of *Squire et al.* v. *Western Union Telegraph Company*, 98 Mass. 232, and which was an action in tort for failing to deliver a message, BIGELOW, C. J., says: "These rules, in their application to damages in actions of this nature, are well settled and familiar. A party who has failed to fulfill a contract cannot be held liable for remote, contingent and uncertain consequences, or for speculative or possible results which may have ensued on his breach of duty, although they may be traceable to that cause. The reason is, that damages of such a nature are not the natural or necessary incidents of a contract, and cannot be deemed to have been within the contemplation of parties when they agreed together. A rule of damages, which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service, would be

a serious hindrance to the operations of commerce and to the transaction of the common business of life. The effect would often be to impose a liability wholly disproportionate to the nature of the act or service which a party had bound himself to perform and to compensation paid and received therefor. The practical rule, founded on a wise policy, and, at the same time, consistent with good sense and sound equity, is that a party can be held liable for breach of contract only for such damages as are the natural or necessary and the immediate and direct results of the breach, such as might properly be deemed to have been in contemplation of the parties when the contract was entered into, and that all remote speculations and uncertain results, as well as possible profits and advantages, and other like consequences which might have arisen from the fulfillment of the contract, must be excluded, as forming no just or legitimate basis on which to determine the extent of the injury actually caused by a breach."

While in this cause the court disallowed the recovery of profits, it held that the defendants, as a contracting party, were liable for the injury actually caused by their breach of duty, and commenting on the opinion delivered by himself in *Elis* v. *American Telegraph Company*, 13 Allen, 226, remarks: "There is nothing in the nature of the business, which they undertake to carry on, that should exempt them from making compensation for any neglect or default on their part." There is another important case bearing on this subject, and one worthy of great attention, as it seems to have been ably argued by counsel and gravely considered by the court. I refer to the case of *Leonard* v. *The New York Telegraph Company*, 41 N. Y. 565. The facts in that case were as follows: On the 24th of September, 1856, Magill & Pickering, acting for plaintiffs, delivered to the Western Union Telegraph Company, at Chicago, a dispatch to be sent to one Shoals, at Oswego, as follows: "D. B. Shoals, Oswego. Send 5,000 sacks of salt immediately. Magill & Pickering." When the message was delivered, it read, "Send 5,000 casks of salt immediately." The term

"sacks," in the salt trade, designates fine salt, containing fourteen pounds, and the term "casks" designates coarse salt, in packages containing not less than 320 pounds. Shoals received the telegram on the day it was sent, and that evening chartered a schooner to take the salt to Chicago, and shipped by her 2,733 barrels of coarse salt. The cargo of salt arrived at Chicago on the 15th day of October. There being no market for the same, it was stored away at the expense of the plaintiff. The salt was worth, at the time of its shipment in Oswego, $1.60 per barrel. The cost of transporting the same to Chicago, exclusive of insurance, was nearly twenty-seven and a half cents per barrel, and on its arrival at Chicago it was not worth at that place to exceed $1.25 per barrel.

The cause was tried before a referee, who found "that the measure of damages to which the said plaintiffs are entitled is the difference in the value of salt at Oswego and Chicago with the cost of transportation added thereto, with interest from the time of the arrival of said salt at Chicago." On commenting on this finding of the referee, EARLE, C. J., says: "The measure of damages to be applied to cases as they arise has been a fruitful subject of discussion in courts. The difficulty is not so much in laying down rules as in applying them. The cardinal rule undoubtedly is, that one party shall recover all the damages which has been occasioned by the breach of contract by the other party. But this rule is modified in its application by two others. The damages must flow directly and naturally from the breach of contract, and they must be certain both in their nature and in respect to the cause from which they proceed. Under this latter rule, speculative, contingent and remote damages, which cannot be directly traced to the breach complained of, are excluded; under the former rule such damages are only allowed as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, as might naturally be expected to follow its violation. It is not required that the parties must have contemplated the actual damages which are to be

allowed, but the damages must be such as the parties may fairly be supposed to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, not violated. As both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract which they have entered into, I think a more precise statement of the rule is, that a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts. * * * I think, therefore, that the rule of damages adopted by the referee was sufficiently favorable to the defendant. The damages allowed were certain, and they were the proximate and direct result of the breach." As to the measure of damages that may be recovered in an action of tort, or for breach of contract, I call attention to the cases of *Shepard* v. *Milwaukee Gas Light Co.*, 15 Wis. 325; *Railroad Co.* v. *Howard*, 13 How. (U. S.) 344; *Masterton* v. *The Mayor, etc., Brooklyn*, 7 Hill, 61; *Fox* v. *Harding*, 7 Cush. 522; *Thompson* v. *Jackson et al.*, 14 B. Mon. 114; *Davis* v. *Talcott*, 14 Barb. 611; *Wade* v. *Leroy et al.*, 20 How. 24; *Waters* v. *Powers*, 20 Eng. Law and Eq. 410; *Fletcher* v. *Tayleur*, 33 id. 187; *Alder* v. *Heighly*, 16 M. & W. 117.

If the authorities from which I have quoted state the rule correctly, and I have no reason to doubt it, then the instruction given by the court, so far as the same relates to the plaintiff's right to recover for profits which he might have made had the message been delivered and the oil sent, etc., is erroneous, and the jury having been misled by it, the cause must be reversed. And as this cause must go back for trial, it is proper that we should add that the plaintiff is entitled to recover not only what he paid the company for transmitting the message, but also the increased price of freight he was required to pay, and also all expenses that the plaintiff incurred by reason of the failure of the defend-

ant to fulfill the contract. The length to which the opinion has already grown prevents reference to other matters that have been assigned for error.

The cause is remanded for new trial in accordance with the principles announced in this opinion, and the parties have liberty to amend their pleadings.

Reversed.

---

1 246
2 288

BERRY v. HART et al.

PLEADING IN TRESPASS — *justification by officer*. In trespass *de bonis* against an officer, if he justify under a writ of attachment, he must aver return of the writ.

SAME — *justification by plaintiff in attachment*. But this rule is not applicable to the plaintiff in the attachment suit.

EVIDENCE — *official character of sheriff*. Whatever rule may be enforced against an officer justifying under process, it seems to be sufficient for third persons to show that he is an officer *de facto*, and a plaintiff in attachment who is sued in trespass is not bound to show that the sheriff who levied the writ was an officer *de jure*. It is sufficient for him to show that the sheriff was performing the duties of the office and generally recognized in it.

JUSTIFICATION *by plaintiff in attachment*. If a plaintiff in attachment is sued in trespass by a stranger to the proceeding he need not aver the ground upon which the attachment was issued.

And if the ground of the attachment is set out in the plea, it is not necessary to support it at the trial.

AGENT — *authority of clerk in a store*. A clerk left in charge of a store during the absence of his principal, with instructions to do the best he can, has no authority to sell the entire stock valued at upwards of $10,000 to a single creditor of his principal to satisfy a debt of less than $7,000.

AGENT'S AUTHORITY — *may be attacked by creditor of the principal*. A creditor of the principal may attack a sale made by an agent, upon the ground that the agent was without authority to make it, but a mere stranger cannot be allowed to interfere between principal and agent.

The creditor must prove a debt and legal process against the principal in the same manner as one who seeks to avoid a sale under the statute of frauds and for the same reason.

Appeal from District Court, Gilpin County.

TRESPASS *de bonis asportatis* against Isidore H. Kastor, William Z. Cozens and appellant. Cozens and appellant

pleaded the general issue; afterward Cozens pleaded specially that he was sheriff of Gilpin county; 6th May, 1867, a writ of attachment came to his hands issued out of the district court of Gilpin county, at the suit of Kastor & Berry, and against Oliver S. Buell, and directed to him to execute, commanding him to attach so much of the estate of Buell as should be of value sufficient to satisfy the sum of $659.25 and costs, etc.; that he levied the said writ on the goods and chattels in the declaration mentioned, as the property of said Buell, and that said goods and chattels were the property of the said Buell at the time when, etc.; that the levying of said writ was the trespass complained of, etc. Appellant filed the following special plea:

And the said defendant, Julius Berry, by Royle & Butler, his attorneys, for a further plea in this behalf by leave of the court, for this purpose first had and obtained, says *actio non* because he says that on the 6th day of May, A. D. 1867, at the county of Gilpin aforesaid, and before the committing of the said trespasses above laid to the charge of the defendants herein, he and one Isidore H. Kastor were partners, doing business at the city of Denver, to wit, in the county of Gilpin aforesaid, under the firm-name and style of Kastor & Berry, and that one Oliver S. Buell, who did business under the name and style of O. S. Buell & Co. at the said county of Gilpin, was indebted to the said Kastor & Berry in the sum of $659.25, and that the said Buell was then and there converting his property into money, with the intent of placing the same beyond the reach of the said Kastor & Berry. And defendant avers that on the said 6th day of May, A. D. 1867, and before the committing of the said supposed trespasses, at the county aforesaid, he made and filed his affidavit in the clerk's office of district court of said Gilpin county, which affidavit was duly subscribed and sworn to before an officer authorized to administer oaths, in which affidavit he alleged that the said Buell was indebted to the said Kastor & Berry in the sum of $659.25, and that the said Buell was converting his property into money with the intent of placing the same beyond the reach of the said

Kastor & Berry, and that he was otherwise disposing of his property, with the intent of placing the same beyond the reach of the said Kastor & Berry; and that said defendant then and there made a good and sufficient bond with good and sufficient surety, and filed the same with the said clerk of the said district court of Gilpin county. And defendant further avers that, on the day and year aforesaid, at the county aforesaid, and before the committing of the said supposed trespasses, upon the filing of the affidavit and bond in the said clerk's office of the district court of Gilpin county, a writ of attachment was issued by the said clerk of said district court at the suit of the said Kastor & Berry against the estate of the said O. S. Buell, and that, on the said 6th day of May, A. D. 1867, at the county aforesaid, the defendant caused the said writ of attachment to be delivered to William Z. Cozens, who was then and there the sheriff of said Gilpin county, which said writ of attachment commanded the said sheriff of Gilpin county to attach so much of the estate, real and personal, of the said O. S. Buell, to be found in the said county of Gilpin, as should be of value sufficient to satisfy the sum of $659.25 and costs, and such estate so attached in his hands to secure so as to provide that the same might be liable to further proceedings thereupon, according to law, at a court to be holden at the city of Central for the said county of Gilpin, upon the second Tuesday of July, A. D. 1867, so as to compel the said O. S. Buell to appear and answer the complaint of the said Kastor & Berry, which said writ of attachment was then and there in full force and effect, and not discharged or satisfied; and which said writ of attachment was directed to the said Cozens, as sheriff of said Gilpin county, to execute, and that the said Cozens, as such sheriff as aforesaid, by virtue of the said writ of attachment, and by the aid and direction of defendant, did, on the 6th day of May, A. D. 1867, at the county of Gilpin aforesaid, in the life-time of the said writ of attachment, take the said goods and chattels in the said declaration mentioned, and levy upon the same, by virtue of the said writ of attachment, as the property of the

said O. S. Buell; and the defendant avers that the said goods and chattels in the said declaration mentioned were the property of the said O. S. Buell and were subject to attachment, without this, that the property of the said goods and chattels in the said declaration mentioned, or any part thereof, at the said time when, etc., was in the plaintiffs, as by the said declaration is above supposed, which are the said supposed trespasses in said declaration mentioned and none other. And this the said defendant is ready to verify, wherefore he prays judgment, etc.

In several replications the plaintiffs below denied the material facts alleged in these special pleas.

At the trial Philip M. Martin testified that he knew the Harts and Cozens and Berry and perhaps Kastor, and did know them in May, 1867. I was called on by Mr. Cozens to invoice the goods he had taken; they were in plaintiffs' store on Main street, Central City, Gilpin county, Colorado; Orlando North assisted us in invoicing; they were taken from the store by Cozens; Hart, Wiggins & Co. were doing business here at that time; John Q. Hart was their agent; I have the invoice list which we made; Cozens saw and examined it, and said it was correct; he told us to invoice the goods at the prices laid down here; Hart told him not to take the goods away, that they were the property of Hart, Wiggins & Co.; the list I hold in my hands is correct; the goods were valued at $4,017; Cozens saw the footings up; he said he got a copy from North and that it corresponded with mine; I was selling goods at that time; have been in that business for twenty-one years; have been in business here since 1861. If the goods had been carefully managed they might bring the invoice price; I think they consisted of hats, caps, sacks, coats, etc. I saw Mr. Berry about there at that time, once in front of the store. The goods were taken in the county; Cozens removed the goods from the store; he boxed them up and took them away.

The plaintiffs then offered in evidence the list referred to by the witness, and the court admitted it.

Cross-examination: Did Cozens take the goods as an

officer? Question was objected to by plaintiffs. Court sustained objection and refused to allow witness to answer. *Defendants excepted.*

Cozens said he had to do his duty; don't recollect whether he said he had to do his duty as an officer;. Hart, Wiggins & Co. had been in business here from four to six days before this; the sale from Buell to Hart, Wiggins & Co. was made in Buell's store; it was agreed between Hart and Cozens that North and I should make the invoice, I think; my understanding was that Hart bought the goods from Oliver Buell; Buell was not here at that time; they were sold by his agent Sherman; Sherman was his agent; I understand that he had authority.

The following question was then asked: Do you know, of your own knowledge, whether Sherman had authority to make the sale? to which plaintiffs objected, and court sustained objection. *Defendants excepted.*

Witness then testified: I have been the agent of Hart, Wiggins & Co. since that time in this territory, in this as well as other matters; Hart was their agent at that time.

Charles C. Post testified that he knew defendants and knew of plaintiffs; the plaintiffs were doing business here on 6th of May; I knew of Julius Berry and Cozens taking the goods of plaintiffs from their store on Main street, in the store now occupied by P. C. Johnson; it was on the 6th of May, 1867; they were putting them into boxes; I saw them roll them out of the store in boxes.

Cross-examination: Berry was working there, taking goods down and helping to pack them; I was there as attorney for Hart, Wiggins & Co.

Defendants then asked: What did Cozens say about the taking, if any thing, at any time during the taking?

Plaintiffs objected, and court sustained objection. *Defendants excepted.*

The following question was then asked: Do you know whether Cozens claimed to take the goods by virtue of a writ of attachment in his hands as an officer?

Plaintiffs objected, and court sustained objection. *Defendants excepted.*

Plaintiffs thereupon closed their case.

Defendant introduced Charles E. Sherman, who testified that he knew the agent of Hart, Wiggins & Co.; I knew Oliver S. Buell in April and May, 1867; he had been in the clothing business just before that time, in the place now occupied by Clark & Sweet, as a tobacco store; he was there at least a year in the same kind of business; I commenced clerking for Buell in that place some time in December, 1866, and continued about five months; while Buell remained here, I was his clerk; when he was gone I had full charge of his business; he went east in 1867; he did business under the name and style of O. S. Buell & Co.; Buell composed the firm; there was no other member to my knowledge; he remained east about a couple of months; I conducted his business during his absence; he did not give me any written authority; he gave me full charge of his business, and told me to do the best I could for him, and what I thought was best; he went east to visit his friends and buy goods, to continue his business; he returned on the 4th of May, 1867, I think; the business was closed on the 29th of April, 1867; the firm sold the goods to Hart, Wiggins & Co.; I sold them as the agent of Buell; the value of the goods sold was somewhere between $10,000 and $11,000; the sale paid the debt of Buell to Hart, Wiggins & Co.; I think the amount of the debt was somewhere between $6,000 and $7,000 with interest; there was no other consideration besides that; they did not pay me any money on the transaction, they gave me no notes or security; Buell never gave me any particular authority to make the sale to Hart, Wiggins & Co.; he gave me general authority; I think O. S. Buell & Co. were indebted to Kastor & Berry; I don't know whether Hart knew or was informed at the time of the sale, that O. S. Buell & Co. were indebted to Kastor & Berry; O. S. Buell & Co. were also indebted to Berry, Hexter & Co., and Deitsch & Bro., in Denver; I don't know whether Hart

knew of the indebtedness to the Denver folks; the sale from Buell to Hart, Wiggins & Co. included one account, and perhaps more, but no note.

Cross-examined: I had authority from Buel to take charge of his business and do the best I could.

Defendants then offered to prove by H. H. Atkins "that he knew who was sheriff of Gilpin county during the month of May, 1867, and for two or three years previous; that he had good means of knowledge, because he was clerk of the district court of said county, and frequently had business with said sheriff; that William Z. Cozens was sheriff in said month of May, and had been for a long time previous; that he was recognized as such by the district court of said county, by public officers, and by the public generally, and that his right to hold and exercise the duties of said office was not disputed."

To which plaintiffs objected, and the court sustained said objection. *Defendants excepted.*

Defendants then offered the affidavit, bond and writ of attachment, and the return of the sheriff indorsed on said writ in the suit of Kastor and Berry against O. S. Buell, and upon plaintiffs' objection the court excluded them.

The jury found for the plaintiffs $4,017.

Messrs. ROYLE & BUTLER, and Messrs. CHARLES & ELBERT, for appellant.

Messrs. JOHNSON & TELLER, for appellees.

HALLETT, C. J. The issues in this case were not the same as in the case of *Deitsch* v. *Hart et al.*, *post*, 300, decided at this term, although appellant's evidence was substantially the same as that offered by Deitsch. In that case, the special plea was found to be substantially defective, and, therefore, the justification failed. In this case, appellant's plea, although, perhaps, it would have been obnoxious to demurrer, is, in our opinion, sufficient after issue joined.

It is said, that appellant should have alleged that the writ of attachment had been returned, and such is the rule

when an officer attempts to justify under a writ of this kind. *Davis* v. *Bush*, 4 Blackf. 330.

But we have found no case in which this rule has been applied to the plaintiff in the writ, and, upon principle, there appears to be no reason for extending it to him. It is the duty of the officer to return the process at the proper time, and he may well be required to perfect his levy by making return, if, at the time of pleading, the return day has passed. The plaintiff in the suit, however, ought not to be charged on account of an omission of the officer occurring after the alleged trespass was committed. If appellant is guilty of a trespass, he became so by suing out the attachment and directing it to be levied, and the circumstance that the officer failed in his duty after the levy will not affect his rights, unless he was in some way responsible for the omission. In *Middleton* v. *Price*, 2 Strange, 1184, the plaintiff in the writ and the officer jointly justified. "And it not being shown that any return was made, the court held, that the officer was a trespasser *ab initio*, and that the plaintiff, by joining with him in the plea, is equally affected by the defect of it."

If they had pleaded separately, probably the plaintiff would not have been held liable for the officer's default.

The plea being sufficient after issue joined, the question most discussed at the bar is the admissibility of the evidence offered in the court below to show the official character of the sheriff. It is conceded that the acts of officers *de facto* are valid, when they concern the public or the rights of third persons, who have an interest in the act done. *People* v. *Collins*, 7 Johns. 549.

The appellant was in no way connected with the sheriff, except that he procured his services in levying the writ of attachment. Desiring to enforce payment of his debt against Buell, appellant sued out process, and, if he found Cozens performing the duties of sheriff, and generally recognized as such officer, we think that he might accept his services without further inquiry as to the tenure by which the office was held. Certainly no question as to the

validity of the levy, predicated upon Cozens' title to the office, can arise between Buell and appellant, and, *a fortiori*, no such question ought to be allowed between appellant and appellees. The circumstance, that Cozens and appellant were sued jointly, can make no difference since they severed in pleading. Whatever rule may be enforced against an officer justifying under process, it seems to be sufficient for third persons to show that he is an officer *de facto*, and the evidence offered by appellant tended to prove this fact, and was, therefore, improperly rejected. From this it follows, that the affidavit in attachment and the writ and return were also excluded improperly.

And here I might pause in the discussion of this cause, but for the suggestion of counsel that the verdict must have been the same if all the evidence excluded upon the trial below had been admitted. This suggestion rests upon an alleged absence of proof upon two points in appellant's defense. In the special plea the ground upon which the attachment was issued is set out, and it is claimed that there is no evidence to support it. But we think that the allegation itself is not material in this action and must be disregarded. In *Damon* v. *Bryant*, 2 Pick. 411, the reason given for requiring an officer to prove a debt in cases of this kind is, that it may appear that he is acting for a creditor because it is only in that character that he can question the vendee's title to the goods.

It is plain that a creditor, when justifying a seizure out of the hands of a stranger, must show his debt upon the same reason. Proof of the relation of debtor and creditor establishes the right of the creditor to proceed against the property of the debtor wherever it may be found, but whether he shall proceed by attachment or ordinary summons is a question of no importance to any other than the parties to the suit. If the debtor should bring trespass against the creditor, there would be strong reason for requiring the creditor to show that there was cause for issuing the attachment because the debtor may question the remedy as well as the right. But a stranger to the process is in a different

position. As to him it is sufficient for the creditor to show his debt, and that he has resorted to legal process for its collection.

It is also urged that appellant failed to show that the sale from Buell to appellees was fraudulent, and therefore the title of the latter parties must be held good. It is to be observed, however, that appellant was not confined to that method of showing title in Buell. It seems that Buell was a merchant, and that he went east to buy goods, and visit his friends, leaving Sherman, his agent, in charge of his business, and that during his absence Sherman sold his whole stock of goods to appellees for the purpose of paying Buell's indebtedness to them. The value of the goods was upwards of $10,000, and the indebtedness of Buell to appellees was less than $7,000. It is difficult to maintain the authority of the agent to make this sale, for if it is conceded that Sherman had authority to sell the whole stock of goods in mass at two-thirds of their value, which is all that can be claimed upon the testimony, there is nothing to show that he had any authority whatever to pay debts. Sherman says that Buell gave him full charge of the business and told him to do the best he could. Giving to this authority the utmost latitude, Sherman had power to sell goods and perhaps pay current expenses, and the sale of the whole stock to a single creditor to satisfy one debt was entirely beyond the scope of his employment. *Nash* v. *Drew*, 5 Cush. 422; *Swett* v. *Brown*, 5 Pick. 178; *Beals* v. *Allen*, 18 Johns. 365.

Appellant had the right to have this question submitted to the jury under proper instructions, but he could not do so except in connection with the other evidence in the case. In this view it was not necessary that he should rely upon fraud in the sale from Buell to appellees, because if the jury should find that Sherman had no authority to pay the debt to appellees, and there had been no ratification of the act, the title was still in Buell and the property was subject to attachment under a writ running against him. That appellant was in a position to question the sale from Buell to

appellee, upon the insufficiency of Sherman's authority to make it, is decided in the case of *Beals* v. *Allen*, cited above.

It seems that a stranger, who seeks to attack a sale upon the want of authority in the agent by whom it was made, must show a debt and legal process against the principal in the same manner as one who seeks to avoid a sale under the statute of frauds, and, for the same reason, a mere stranger cannot be allowed to interfere between principal and agent. *Jackson* v. *Van Dalfsen*, 5 Johns. 44.

It was necessary for appellant to show privity between himself and Buell before he could attack the sale made by Sherman, and for this purpose the evidence of indebtedness and process, and the official character of the sheriff was material to his defense. Upon this ground, also, this case is to be distinguished from that of *Dietsch* v. *Hart et al.*, in which there was no sufficient plea of justification under which the appellant could attack the sale from Buell.

There are other questions in this record which probably will not arise in another trial of the cause, and, therefore, they are not noticed.

The judgment of the district court is reversed, with costs, and the cause is remanded for a new trial.

Reversed.

CHENEY *v.* BARBER.

PRACTICE — *manner of preserving objection, that written instrument has been altered after execution.* It was objected to a written instrument when it was offered in evidence, that it had been altered after execution by changing the name of the payee and the date, and the objection was overruled. The instrument not having been attached to the record filed in this court, the ruling of the court below on this point cannot be reviewed.

Construction of contract. Contract for payment of $600 in four months and an additional $600 upon the sale of certain mining property. Comments and construction.

CONDITION PRECEDENT — *performance must be proved.* In order to recover upon an agreement to pay $600 when W. S. R. should sell certain mining

property on the Bobtail lode, the plaintiff must prove that W. S. R. sold property on that lode, and also that the property so sold was that which was referred to in the agreement.

Appeal from District Court, Gilpin County.

Messrs. W. S. & L. C. ROCKWELL, for appellant.

Messrs. JOHNSON & TELLER, for appellee.

BELFORD, J. This was an action of assumpsit founded on the following note and agreement in writing:

"Four months after date, for value received, we jointly and severally promise to pay J. E. Barber, or order, $600. Signed, Wm. S. Rockwell, Hazen Cheney. October 3, 1868.

"In consideration of the above sum being without interest we promise and agree that should Wm. S. Rockwell, one of the signers hereto, effect a sale at the east or elsewhere, of certain mining property on the Bobtail lode, and receive his pay therefor, then we will pay an additional $600. Signed, William S. Rockwell, Hazen Cheney. (Seal.)"

It is alleged in the complaint that, on the 3d day of October, 1863, the plaintiff Barber, together with certain other parties, were the owners of certain mining property situated in Gilpin county and known and described as the east sixty-six and (2-3) two-thirds feet of claim number one east, and the west twenty feet of claim number two east on the Bobtail lode. That, on the day aforesaid, William S. Rockwell applied to the plaintiff for a power of attorney from him, authorizing Rockwell to negotiate a sale of the interest of the plaintiff in said property, and also, at the same time, applied to plaintiff for the loan of $600 in money for his own benefit. That thereupon it was agreed between Rockwell and Barber that the plaintiff would loan and advance to Rockwell the sum of $600, and also empower him to sell and convey the interest of the plaintiff in the property above described, on the condition that Rockwell and Cheney should make a joint and several promissory note to the plaintiff (being the one above set

forth), and payable four months after date, for the sum of $600, and that said defendants, Rockwell and Cheney, would further execute and deliver to plaintiff an agreement in writing (being the one above set forth), that upon the sale of said property they would pay the plaintiff an additional sum of $600 to that mentioned in said note. It is further alleged that Rockwell and Cheney did thereupon execute said note, and at the same time and place make their certain agreement in writing, whereupon the said plaintiff duly empowered the said Rockwell to sell and convey the said property above described, and to execute a deed therefor. And the plaintiff further avers that afterward, to wit, on the 31st day of March, 1864, Rockwell did sell and convey the same identical property referred to and mentioned in the written agreement above set forth, and received the pay therefor. A trial was had by the court, a finding for the plaintiff, and judgment for the sum of $1,500.

The plaintiff, to maintain his action, offered in evidence the note and agreement, to the introduction of which the defendant objected, "because said note and agreement have been altered by substituting the name of a different payee, and that the date of the said note has been changed since the same was executed." Which objections were overruled by the court, and this is the first error assigned. We have no data before us by which the tenability of these objections can be determined. There is no evidence before us, that these objections urged by counsel existed; in fact, the execution of the papers is admitted, and we are asked to conclude that the instruments offered in evidence were altered upon the simple ground that the counsel so stated when they were offered in evidence. Had the originals been attached to the bill of exceptions, we might derive some light from an inspection, but this is denied us. Neither the originals, nor any evidence showing the alleged alteration, have reached this court. The general rule is, that the material alteration of an instrument, made by a party who claims the benefit of it, without the consent of the party against whom it is sought to be

enforced, renders it void. The question of alteration is a question of fact. The true rule in regard to the burden of proof is, that when the alteration is of such a character as to defeat entirely its operation for any purpose, as in the case of an erasure of the signature of a deed or other instrument, so that, admitting all to be true that appears upon the instrument, when produced it would be void in law, it should be explained in the first instance before it should be permitted to go to the jury. In other cases the instrument should be given in evidence, and should go to the jury upon the ordinary proof of execution, although an alteration may appear in it, leaving the parties to such explanatory evidence as they may choose to offer. But if there is neither intrinsic nor extrinsic evidence as to when the alteration was made, the presumption of law is, that it was made before or at the execution of the instrument. *Stoner* v. *Ellis*, 6 Ind. 152. It nowhere appears that any proof was offered, tending to show that any alterations were made in the instruments, and in the absence of all evidence on the subject, we cannot say that the action of the court in admitting these instruments was erroneous.

It is claimed by the appellant that the contract sued on is an entirety in law ; that it contains but one agreement as to payment and time of payment, the latter being four months after date, the amount to be paid four months after date to be either $600 or $1,200, depending on the happening of an event, being the sale of certain mining property. It is very clear that the first instrument sued on is a contract to pay $600 four months after date. This payment depends on no contingency and hinges on no condition. It is an absolute promise to pay, and, at maturity, the plaintiff might have instituted legal proceedings to enforce its collection, omitting, at the same time, any mention or notice of the contract which immediately followed it.

In the second contract it is stipulated that, as no interest has been charged for the loan of the sum secured by the promissory note, Rockwell & Cheney will pay $600 more to Barber, should Rockwell succeed in selling the mining prop-

erty which Barber authorized him to sell. We cannot agree with the appellant in his theory that the obligation to pay the additional $600 depended upon the sale of this property within four months, or during the time intervening between the execution and maturity of the note. The contingency upon which this second $600 became payable was the selling of the property. When a sale was effected, and the money therefor received by Rockwell, then his promise ripened into an absolute liability. There nowhere appears in this second contract any limit as to the time when the sale was to be made, and to give it the construction claimed by the appellant, we must interpolate into the body of the contract words which the parties to it did not deem fit to incorporate. In other words, we must make a new contract for them. This clearly is not the province of a court. To construe contracts, not make new ones, is our duty.

We are, therefore, of the opinion that, upon a sale being made, Rockwell & Cheney became liable for the additional $600.

It is further contended by the appellant that there is no evidence showing that a sale was made by Rockwell. It will be observed that the contract fails to describe specifically the property to be sold. It was on the Bobtail lode, but what particular portion of it?

To entitle the plaintiff to recover, he must show that the property, concerning which the contract was made, was sold by Rockwell. To prove a sale, he introduced in evidence a deed made by Rockwell as attorney in fact of Barber and others to George A. Hoyt. Conceding that this deed was properly admitted in evidence, there is nothing in the record showing that the land described in the deed was the same about which this contract was made. If left to enter the domain of inferences, we might conclude that the property was the same, but the plaintiff, to recover, must rely on something better than inferences. It was in his power to prove this fact, and he should have done so. The testimony of Lyon throws no light on this branch of the subject, and the statement in Rockwell's letter is entirely too ambig-

nous to be relied upon with safety. From the careful examination we have given the evidence, we are forced to the conclusion that it is not sufficient to prove a sale of the property about which the contract was made.

This cause is therefore reversed and remanded for a new trial, at the costs of the appellant.

Reversed.

SULLIVAN et al. *v.* CLEMENTS.

1 261
2 369

1 261
f35 300

EVIDENCE *must support the allegation.* In an action of trespass *quare clausum*, if the *locus in quo* be described in the declaration, the evidence must be confined to the place named.

TRESPASS *quare clausum. Evidence of possession.* In trespass *quare clausum*, if the plaintiff does not show title, he must show that he was in possession of the *locus in quo* at the time of the alleged injury.

Appeal from District Court, Jefferson County.

Messrs. JOHNSON & TELLER, for appellants.

Messrs. BROWNE, HARRISON & PUTNAM, for appellee.

HALLETT, C. J. This was an action of trespass *quare clausum fregit* in the district court of Boulder county and thence removed to Jefferson, where appellee obtained judgment for $1,360. The description of the *locus in quo* in the declaration is according to the government survey, and is wholly unintelligible, except the last clause, which comprehends twenty acres of land. Rejecting that part of the description which we cannot understand and accepting that which is good, the declaration is for a trespass upon twenty acres of land, described according to the lines of the public survey. The only witness who attempted to describe the premises was less successful than the pleader, inasmuch as his description is unintelligible throughout. All the witnesses speak of a tract of land, containing one hundred and sixty acres, and we find nothing to connect their testimony with the *locus in quo*, given in the declaration. Therefore the proof does not come up to the allegation, and in our opinion this is a substantial omission.

By the ancient common law it was unnecessary to name the *locus in quo* in the declaration, and if the defendant pleaded the general issue, the plaintiff could prove a trespass in any part of the parish in which the venue was laid. By the use of the common bar, asserting title to some particular close in the parish, the defendant could compel the plaintiff to describe the close by name or otherwise, and then the parties in the third pleading came to the point, which is now gained in the declaration.

This practice was virtually abolished in A. D. 1654, by allowing plaintiffs to name the close in which the trespass was committed in the declaration. 4 Robinson's Prac. 584.

Perhaps the old practice might be followed at this day in a proper case, but when the *locus in quo* is described in the declaration, it would seem, upon principle and authority, that the evidence should be confined to the place named. 2 Greenleaf's Ev. 618 *a*; *Fowle* v. *Wyman*, Quincey (Mass.) 336; *Vowles* v. *Miller*, 3 Taunt. 139.

Another objection to the evidence demands attention. Appellee did not introduce evidence of title, but relied upon possession of the *locus in quo*, and of course it must appear that he was actually in possession at the time of the alleged trespass, inasmuch as there can be no constructive possession in the absence of title. According to the witness Hollingsworth, appellee's possession commenced November 25, 1867, and as he alone appears to have had knowledge of the fact, his statement must be accepted as true. Now there is no evidence of an entry by appellants after this time. Appellants entered the premises on the 4th of November anterior to appellee's possession, and at other times not named by the witnesses, but it does not affirmatively appear that appellee's possession was ever disturbed. The gist of this action is injury to the possession, and the evidence must show that the possession of the plaintiff has been invaded. *Dean* v. *Comstock*, 32 Ill. 173.

For these errors the judgment of the district court must be reversed, with costs, and the cause remanded.

Reversed.

HASKINS v. TUCKER et al.

PRACTICE—*judgment when declaration not on file.* The court cannot proceed to judgment in an action at law without a declaration on file in the cause.

COSTS *will not be allowed to party in fault.* Where the error complained of was occasioned by the negligent act of the attorney for plaintiff in error costs will not be allowed.

Error to Probate Court, Clear Creek County.

Mr. C. C. POST, for plaintiff in error.

Mr. L. H. SHEPHERD, for defendant in error.

HALLETT, C. J. It appears by the bill of exceptions in this case, that the declaration, although seasonably filed in the cause, was not before the probate court at the time judgment was rendered. One of the attorneys for the plaintiff in error had taken the paper from the files by consent of the probate judge and had failed to return it, and the court appears to have regarded this omission of the attorney as sufficient to warrant the court in proceeding to judgment without the pleading.

A declaration is the statement of the plaintiff's cause of action and enters into the record of the cause. Without it the court cannot be informed of the nature and extent of the plaintiff's demand, and of course cannot give to such demand the form of a judgment. If an attorney or other person shall be guilty of misconduct in taking papers from the files of a court, or in refusing to return such papers, he may be punished for his offense; but the wrongful act of a person in taking pleadings from the files will not cure defects in the record caused by such withdrawal. It was in the power of the court below to allow the loss of the declaration to be supplied by filing a copy, if defendants in error had sought to do so, but the court could not proceed to judgment without a declaration on file. As the error in this record appears to have grown out of the negligent act of the attorney for plaintiff in error, we shall not

allow the plaintiff any costs. The judgment of the probate court is reversed and the cause is remanded.

Reversed.

GALLUP et al. v. WILDER et al.

PRACTICE — ***declaration must be filed before judgment.*** **It is error to take judgment without a declaration on file in the cause.**

Error to Probate Court, Fremont County.

Messrs. CHARLES & ELBERT, for plaintiff in error.

Per CURIAM. On the 13th day of July, 1867, the plaintiff below sued out of the probate court of Fremont county a summons against the defendants below, which summons was made returnable on the 5th day of August, 1867. It was served the day it was issued on Gallup and Lothrop. On the 11th day of February, 1868, the defendants, Gallup and Lothrop, were defaulted and judgment entered up against them for the sum of $1,200. The record states that after the default was entered evidence was thereupon introduced by the plaintiffs, and thereupon the court ordered that the plaintiffs recover from the defendants the sum of $1,200, etc., etc.

On the 23d day of June, 1868, and after the proceedings above were had, the plaintiffs filed their declaration. This course of procedure cannot be tolerated. The filing of the declaration after the default and judgment were had would not cure the want of authority nor remove the defects that existed. *Rankin* v. *Crowell*, Miner, 125.

There are other errors in the record but it is unnecessary to allude to them.

The cause is reversed and remanded, with costs.

Reversed.

FORD et al. v. BROWN et al.

PRACTICE *as to bill of particulars.* If the declaration contain a special count on a promissory note, and the common counts, and the plaintiff stipulate that he will at the trial rely upon the promissory note only, it is not necessary to file a bill of particulars.

PRACTICE *as to filing copy of instrument sued on.* If a copy of the instrument on which the action is founded is filed with the declaration, and the declaration is amended, it is not necessary to file another copy with such amendment.

Error to District Court, Arapahoe County.

Mr. L. B. FRANCE, for plaintiff in error.

Mr. W. C. KINGSLEY, for defendant in error.

BELFORD, J. John S. Brown and William McKindly brought suit against William R. Ford et al., in assumpsit. The declaration consisted of a special count on a promissory note, and also the common counts. A demurrer was filed to the special counts, and an answer as to the common counts. The demurrer was confessed and leave taken to file an amended declaration. Upon the filing of the amended declaration the defendant asked for a rule on the plaintiffs to file a more specific bill of particulars. This was met by a stipulation on the part of the plaintiffs, that in the trial of the cause they would rely wholly on the note, and thereupon the rule for the filing of the more specific bill of particulars was not granted. We see no error in the court denying the rule. When the plaintiffs stipulate that their only cause of action is the note, and that they will rely on no other, we see no necessity for the filing of a bill of particulars. It is contended by the plaintiffs in error that inasmuch as no copy of a note was attached to the amended declaration, they were entitled to a continuance. There is nothing in this. A copy of the note was affixed to the original declaration, and this was sufficient. In confessing the demurrer the plaintiffs below did not withdraw the declaration. They simply took leave

to amend it. When a copy of the instrument sued on is attached to the original declaration, and this declaration is amended, we know of no rule of law that requires a copy of the instrument to be attached to the amendment.

Had the plaintiffs withdrawn their declaration at the time they confessed the demurrer the rule would be otherwise. But they did not do so. There is a wide distinction between withdrawing a declaration and amending it.

We see no error in the record, and consequently the judgment is affirmed, with costs.

Affirmed.

---

1 266
2 276
2 499

SOPRIS *v.* LILLY et al.

PLEADING — *declaration on replevin bond.* In actions on penal bonds in which, under the statute, the plaintiff assigns several breaches of the conditions of the bond in a single count of the declaration, the several assignments in connection with the body of the count are regarded as constituting separate and distinct counts of the declaration.

PLEA TO WHOLE DECLARATION — *must answer all allegations therein.* In an action upon a penal bond, a plea which goes to the whole declaration must be sufficient as to all breaches of the conditions of the bond which are well assigned therein.

In an action on a replevin bond it was alleged that the principal in the bond failed to prosecute the replevin suit with effect and to return the property replevied according to the conditions of the bond. The defendants pleaded that the property was in fact returned and the costs of the replevin suit paid. The plea was bad, for the reason that it did not answer the breach assigned upon failure to prosecute the replevin suit.

DAMAGES *for detention of property.* In an action on a replevin bond, in which it is assigned for breach of the condition of the bond that the principal did not prosecute the replevin suit with effect, damages for the detention of the property replevied may be recovered.

Error to Probate Court, Arapahoe County.

Mr. ALFRED SAYRE, for plaintiff in error.

Mr. L. B. FRANCE, for defendants in error.

HALLETT, C. J. The declaration in this case is upon a replevin bond, the conditions of which are alleged to have

been violated by the failure of defendant Lilley to prosecute the replevin suit with effect, and to return the property replevied, in obedience to the judgment of the court in that suit. In a plea which goes to the whole declaration the defendants set up, that the property was in fact returned, and the costs of the replevin suit paid, but nothing is said as to the failure to prosecute the replevin suit with effect. In actions upon penal bonds, in which, under the statute, the plaintiff assigns several breaches of the conditions of the bond in a single count of the declaration, the several assignments in connection with the body of the count are regarded as constituting separate and distinct counts of the declaration, and we are authorized to say, that there are as many counts in the declaration as there are breaches of the conditions of the bond. *Hibbard* v. *McKindly*, 28 Ill. 253. If to such a declaration the defendant wishes to plead to the count taken in connection with any of the assignments separately from the others, there can be no objection to his doing so, but in such case he must limit his plea to the breach which he proposes to answer. It has always been held, that a plea which professes to answer the whole declaration must be sufficient as to each and every count in the declaration, and this rule, applied to cases of this kind, shows that a plea which goes to the whole declaration must be sufficient as to all breaches of the conditions of the bond, which are well assigned in the declaration.

Humphrey et al. v. *Taggart*, 38 Ill. 228. In this case there are two assignments of breaches of the conditions of the bond, and the plea, which professes to answer both of them, contains an answer to but one of them. We are unable to perceive any reason for denying the plaintiff's right to recover for the breach of the bond, in respect to the prosecution of the replevin suit with effect. If it is thought that the plaintiff cannot recover damages for the detention of the property, we regard the case of *Shepard* v. *Butterfield*, 41 Ill. 76, as decisive of the question. If, in the replevin suit, Booth had recovered damages for detention of the property, such recovery would be no evidence of the

amount of such damages in this action under the breaches assigned in this declaration. If any damages for detaining the property had been awarded against Lilly in the replevin suit, perhaps an action to recover them would lie upon that provision of the bond, which provides for the payment of all damages which should be adjudged against him. But we are not concerned with that view of the case at present, and indeed we have now only to say, that the plea does not meet the whole declaration, and therefore the demurrer ought to have been sustained. The judgment of the probate court is reversed with costs, and the cause is remanded.

Reversed.

---

1 268
2 282
2 638
6 370

LITCHFIELD v. DANIELS.

JURISDICTION OF PROBATE COURT — *plaintiff may remit excess over $2,000, and sue in that court.* If the plaintiff's demand exceed $2,000, he may remit the excess and sue for that sum in the probate court.

PRACTICE — *plaintiff's demand determined by ad damnum.* If the plaintiff limit the *ad damnum* in his declaration to $2,000, this shall operate to remit the excess over that sum to the defendant.

CONTINUANCE — *to obtain testimony of absent witness — necessary diligence.* Upon affidavit for continuance on the ground of absence of witness, it appeared that defendant entered appearance Oct. 12, 1869; that he was not informed as to location of witness until January 29, 1870. *Held*, that affidavit was defective in not showing that inquiry was made for the witness between those dates.

PLEADING — *denying partnership.* Under section 6, chapter 30, Revised Statutes, 310, a plaintiff is not required to prove the joint liability of defendants sued as partners, unless the execution of the instrument sued on is denied by plea verified by affidavit.

IMMATERIAL ISSUE — *plea denying partnership.* Where in a suit on a promissory note against several defendants, as partners, one of them pleaded that at the date of the execution of the note he was not the partner of his co-defendants, the plaintiff was not required to prove the partnership.

Appeal from Probate Court, Arapahoe County.

Mr. S. E. BROWNE, for appellant.

Mr. ALFRED SAYRE, for appellee.

BELFORD, J. This was an action of assumpsit, brought in the probate court of Arapahoe county by the appellee against Abraham T. Litchfield, John W. Anthony, David Street and Henry Carlisle, copartners as John W. Anthony & Co., on a promissory note, of which the following is a copy:

"LARIMER CITY, WYOMING TERT.,
"*August* 17, 1868.

"One day after date, for value received, we promise to pay to the order of Daniels & Brown, the sum of $1,853.81, being balance due on book account with interest from date, at the rate of seven per cent per annum, until the sum shall be paid. "JOHN W. ANTHONY & Co."

This note was indorsed by the payees to the plaintiff.

To the plaintiff's declaration, which consisted of a special count on the note, together with the consolidated common counts, the defendant filed the following plea verified: "And the defendant, Abraham T. Litchfield, by his attorneys, comes and defends the wrong, etc., and prays judgment, etc., because he says, that the defendant, Abraham T. Litchfield, at the time when, etc., was and is not a partner of the said John W. Anthony, David Street and Henry Carlisle, and is not jointly liable with the said John W. Anthony, David Street and Henry Carlisle as partners aforesaid, on the said supposed promises and undertakings in the said declaration mentioned in manner and form as the said plaintiff has, in his said declaration, alleged against him," etc. Issue was joined on this plea and the trial had by the court, who found for the plaintiff. The only evidence introduced on behalf of the plaintiff was the note. The defendant called no witness. The first objection taken by the appellant to the proceedings below is, that on the day that the summons was issued, there was due on said promissory note the sum of $2,019. It is insisted that the jurisdiction of the probate court is limited to the sum of $2,000, and that the claim sued on exceeds that amount by $19, and that the court had no power to try and deter-

mine the cause, for the reason that this sum of $19, being in excess of the amount fixed by law as the limit of the court's jurisdiction, rendered all the proceedings void. Section 25 of the revised code, page 526, provides: "The probate courts in the said several counties mentioned in the first section of this act, except the county of Gilpin, shall have concurrent jurisdiction with the district courts in all civil cases at law and in equity, where the debt or sum claimed shall not exceed $2,000."

While the amount due on the note at the issuing of the summons might have exceeded the amount prescribed in the above section, still the limit of the plaintiff's action was $2,000. This was the extent of his *ad damnum*, and beyond this amount he sought to recover nothing. After a careful consideration of the section above cited, and of the provisions in the organic act, we are of the opinion that it is not the amount due on the instrument sued on that fixes and determines the jurisdiction of the court, but the amount and extent of the plaintiff's claim. If there be due on the instrument sued on $10,000, still if the plaintiff limits his claim to $2,000 the case is within the jurisdiction of the court. The limitation of his claim in the *ad damnum* operates *per se* as a remittance of whatever amount may be due in excess of $2,000. The next error complained of is the overruling of the defendant's application for a continuance. This suit was commenced in the probate court on the 12th day of October, 1869. On the 14th of December the defendant filed his plea, and on the 14th of February, 1870, he filed his application for a continuance. The sufficiency of the application for a continuance can be determined by either of two considerations, viz., 1st. The diligence used to obtain the evidence of the absent witness. 2d. The materiality of his testimony as disclosed by the affidavit. As to the diligence used to obtain the testimony of the witness, it is alleged in the affidavit that the defendant was ignorant of the whereabouts of this witness until January 29, 1870, and he then learned that the witness was in San Francisco, but about to sail for New York. It nowhere appears that he

did sail for New York. It is nowhere alleged in the affidavit that from October 12, when the suit was commenced by the waiving of process by Litchfield, that any inquiry was made to ascertain the location of this witness or procure his testimony. If Mr. Litchfield was not a partner of Anthony & Co. at the date of the execution of the note sued on, he certainly knew that fact on the day when he entered an appearance. He knew what the issue would be, and it behooved him to make reasonable efforts to procure the testimony of witnesses by whom he might make good his defense. The court was clearly right in overruling the application for a continuance, for the reason that no diligence was shown to obtain the testimony of the witness.

It is further claimed that the court erred in finding for the plaintiff and entering up judgment in the face of the plea filed by the defendant. It is contended that it was incumbent on the plaintiff to do something more than simply introduce the note. It is insisted that it devolved on him to show that Litchfield was a partner in order to make him liable in the action.

Section six (6) of the Revised Code, page 310, provides in actions upon contracts, express or implied, against two or more defendants, alleged to have been made or executed by such defendants as partners or joint obligors or payors, proof of the joint liability or partnership of the defendants or their Christian or surnames, shall not in the first instance be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by the filing of pleas denying the execution of such writing verified by affidavit as required by law.

From a reading of this section, it is evident that before the plaintiff can be required to introduce any evidence going to show that the defendants were partners or joint obligors, the defendant must file his plea not denying the partnership or joint obligation, but denying the execution of the writing sued on.

The plea filed in this case goes to no such extent; it simply avers that at the date of the note he was not a partner,

nor was he such partner at the time of the filing of the plea. This does not meet the requirements of the statute, nor did it render it necessary for the plaintiff to introduce other evidence than the note itself. Before the revision took place (see Laws 1861, p. 215, § 6) the law was different. The defendant could require the plaintiff to put in proof of partnership by filing a plea of abatement or by denying the execution of the writing sued on, but in the revision that part of section 6, page 215, Laws of 1861, which made it necessary for the plaintiff to establish the partnership when the defendant put it in question by plea of abatement, was omitted. The evident intention of the legislature in the revision was to relieve the plaintiff from the proof of partnership, when the execution of the writing itself was not denied under oath. And so reading the statute we are compelled to affirm the judgment rendered below, which is accordingly done, with costs.

Affirmed.

1	272
1	414
2	34
1	272
12a	76

CODY v. RAYNAUD.

JURISDICTION OF PROBATE COURT *in foreign county.* Section 2, chapter 70, Revised Statutes, 500, applies to actions brought in probate courts.

PLEADING *in action where defendant resides in foreign county.* It is not necessary to aver in the declaration the facts which will give the court jurisdiction over a defendant who resides in another county.

JURISDICTION — *want of — must be pleaded in abatement.* If the court has not jurisdiction of the person, the defendant must plead that fact in abatement, and she cannot raise the question by motion.

JURISDICTION OF PROBATE COURTS. Probate courts are of limited but not inferior jurisdiction.

CONTRACT, EXPRESS — *may be abandoned for cause.* A party may for good cause, and where the fault is not his own, abandon a special contract and recover the value of services upon an implied assumpsit.

CONTRACT, EXPRESS — *if abandoned, plaintiff must resort to implied.* In such case the law raises a contract for the protection of the innocent party, and the express contract is not involved except for the purpose of ascertaining whether there was cause for abandoning it.

CONTRACT, EXPRESS — *abandoned without cause.* Where a special contract was entered into, by which the plaintiff agreed to serve the defendant for the

term of one year, if the plaintiff voluntarily and without the fault of the defendant quit the service of the defendant, she cannot recover.

The special contract being shown, it ought to appear that there was sufficient cause for abandoning it.

EVIDENCE *of abandonment of contract.* As to the cause for abandoning a special contract it is not enough that a witness should testify that plaintiff quit defendant's employment because of abusive language and bad treatment. Specific acts of defendant should be proved.

EVIDENCE *of acquiescence in plaintiff's demand.* Where the plaintiff proved a contract for service which had not been performed, and it appeared that at or about the time the plaintiff quit defendant's service the defendant requested the plaintiff to remember that she had left and had not been discharged, the circumstance that the defendant made no objection to a bill for services rendered, which was subsequently presented by the plaintiff, is not sufficient to show an agreement on the part of defendant to pay the same.

Error to Probate Court, Arapahoe County.

THE declaration contained the common counts for work and labor and the money counts.

At the trial plaintiff read the deposition of Anna Lemon, who testified in substance, that in March, 1869, in New York city, the defendant entered into a contract with the plaintiff, by which she employed the plaintiff to go to Denver and work for her at the rate of $50 per month for the term of one year; also that defendant agreed to pay plaintiff's traveling expenses in going to Denver.

Plaintiff also read the deposition of Wm. E. White to the same effect, except that he stated that the plaintiff was to receive $40 per month for the term of one year, and that the plaintiff was to receive her traveling expenses if she remained with defendant the full year, otherwise the traveling expenses were to be deducted from plaintiff's salary.

Alice Mulchinock testified: "I was in Mrs. Cody's employment at the time Madame Raynaud left, and afterward Madame Raynaud left Mrs. Cody on or about July 3d, 1869; she came in the store at Central City, Colorado Territory, afterward, and asked Mrs. Cody to settle with her; Mrs. Cody asked her what the amount was, and she (Mrs. Raynaud) calculated it in my presence at $50 per month, for three months and one week; Mrs. Cody made

no objections at the time to Mrs. Raynaud about the amount; she said to me after Mrs. Raynaud left that she did not know how she (Madame Raynaud) had got it up to that, for you know (speaking to witness) it was only forty per month. I said I did not know it because I was not present at the agreement; that she (Mrs. Cody) had told me so, but Mr. White had told me it was $50 per month. That was all the conversation.

Question by plaintiff's counsel:

Did Mrs. Cody make any objections there in the presence of Mrs Raynaud to paying her? Answer: She only said she would deduct her traveling expenses; I do not remember the amount of Madame Raynaud's bill. She calculated at the rate of $50 per month. It was for three months and one week. She (Madame Raynaud) left on Saturday, July 3, 1869, and called on Mrs. Cody Monday, July 5, 1869. I was present on Saturday when Mrs. Raynaud left. I had been in Mrs. Cody's employment from May 2, 1869, to then, and continued in her employment to August 2, 1869; Mrs. Raynaud left on account of Mrs. Cody's abusive language; I told Mrs. Raynaud to go on that day; there was no reason for Mrs. Cody to use such language.

Question: State just what Mrs. Cody told you she was paying Madame Raynaud? Answer: She stated to me that she was paying her ten per week. Mrs. Raynaud was in the employment of Mrs. Cody at Central City, when I came there, and remained in her employment until July 3d. Mrs. Cody told me she sent Madame Raynaud to Central because business was better there than in Denver. Madame Raynaud had gone to Central before I came to Denver.

Cross-examined by defendant's counsel: Madame Raynaud left the employment of Mrs. Cody because she was badly treated. She was not discharged, Mrs. Cody did not tell her to go, but she was so badly treated it was impossible for her to stay.

Question: After Madame Raynaud left and came back, on July 5th, do you remember that Mrs. Cody stated to her

that she had left, and she (Mrs. Cody) had not discharged her, and do you remember the reply Mrs. Raynaud made?

Answer: Mrs. Raynaud made no reply. I am sure Mrs. Raynaud's bill, when presented to Mrs. Cody, was for three months and one week, and she calculated it at $50 per month. She so stated to Mrs. Cody in my presence. I have a suit pending against Mrs. Cody, and have no very kind feelings for her. On several occasions Mrs. Cody abused Mrs. Raynaud in my presence, on one occasion Mrs. Raynaud got so sick on account of it that she had to go to bed, and got to spitting blood. She was not subject to any pulmonary disease. I never heard her use any abusive language to Mrs. Cody.

Re-examined: It was on the day Madame Raynaud left that Mrs. Cody said to her: "Madame Raynaud you will remember that you have left, and I have not discharged you." It was on the following Monday, July 5, that Madame Reynaud called on Mrs. Cody and presented her bill, and all that Mrs. Cody then said was, that she would deduct her, Madame Raynaud's, traveling expenses. Mrs. Cody did not state to Madame Raynaud what the amount of her traveling expenses were; all she stated was, that she would deduct the amount of her traveling expenses. Mrs. Raynaud presented her bill for the full amount, and Mrs. Cody made no objections, except she said she would deduct her (Mrs. Raynaud's) traveling expenses."

Mr. DANIEL SAYER, for plaintiff in error.

Mr. S. E. BROWNE, for defendant in error.

HALLETT, C. J. This was assumpsit in the probate court of Arapahoe county, for work and labor.

Plaintiff in error, who was defendant in the court below, was served with summons in Gilpin county, and the first assignment of error questions the power of the probate court to issue process to that county.

The jurisdiction of probate courts in civil actions, when the sum in controversy does not exceed $2,000, was first

conferred by the legislative assembly in the year 1864. By the fifth section of that act, it was declared that the probate courts named should have concurrent jurisdiction with the district courts in all civil cases at law and in equity, where the debt or sum claimed should not exceed $2,000. By the sixth section the rules of practice of the district courts were made applicable to probate courts, and by the ninth section the probate courts are declared to be courts of record, and "they shall have a seal, and in their respective counties shall possess all the powers now vested in the district courts in this territory in all matters in controversy where the debt or sum claimed does not exceed $2,000."

This act did not comprehend the probate court of Arapahoe county, but in the following year an amendatory act extended the provisions of the first to all probate courts in the territory except that of Gilpin county. In section three of this last act jurisdiction was again conferred upon probate courts, but in language different from that of section five of the act of 1864, the words "concurrent jurisdiction with the district courts" being omitted from the act of 1865. But we doubt whether this omission is of any importance. The latter act comprehends "all actions, suits and proceedings at law brought for the recovery of money not exceeding in amount the sum of $2,000," and this jurisdiction is as plainly concurrent with the district courts as if it were so expressed.

One of the purposes of the act of 1865 was to withdraw from probate courts the equity jurisdiction conferred by the act of 1864, and to this end new language was used in conferring jurisdiction, which differs of course from that used in the first act, but not significantly, except as to the purpose which the assembly had in view.

It is to be observed also, that section 9 of the act of 1864, which gives to probate courts, within the limits prescribed to them, all the powers conferred upon district courts, was not expressly or impliedly modified by the act of 1865, and the same is true of the sixth section of the first

act, which applied the practice of the district courts to the probate courts.

We are, therefore, clearly of the opinion that the second section of chapter 70, Revised Statutes, which prescribes the venue of civil actions is applicable to such actions in probate as well as district courts. By that section in certain cases actions may be brought in a county in which the defendant does not reside, and the summons served in the county of his residence. And of late it has not been thought necessary to aver in the declaration the facts which will give the process such extra-territorial force. *Kenney* v. *Greer*, 13 Ill. 432; *Hamilton* v. *Dewey*, 22 id. 490.

These cases also show that the question of jurisdiction is raised by plea in abatement and not by motion as was attempted in this case.

Much was said at the bar upon a question which was determined by this court in the case of *Davis* v. *Cass*. Probate courts are of limited, but not inferior, jurisdiction.

We are unable to deny the jurisdiction of the court below, and we will now consider the sufficiency of the evidence to support the judgment.

It appears from the evidence, that, in the month of March, 1869, defendant in error agreed with plaintiff in error to work for her one year as a milliner, and that she left the service of plaintiff in error after working a little more than three months. This special contract is not set out in the declaration, and if it were it is difficult to see how defendant in error could recover upon it, since it was never performed.

But a party may, for good cause and when the fault is not his own, abandon a special contract and recover the value of services upon an implied assumpsit. *Lantry* v. *Parks*, 8 Cow. 63; *McClure* v. *Secrist*, 5 Ind. 31; *Eldridge* v. *Rowe*, 2 Gilm. 91.

In such case the law raises a contract for the protection of the innocent party, and the express contract is not involved, except for the purpose of ascertaining whether there was cause for abandoning it.

Perhaps the price fixed by the express contract may be of some value on arriving at the compensation to be awarded under the implied contract, but the parties are not bound by it.

The measure of damages is the value of the services or materials furnished, and the aggrieved party is no more bound by the contract price than by the other provisions of the instrument.

If the defendant in error quit the service of the plaintiff voluntarily and without the fault of the latter, she cannot recover, and the special contract being shown, it ought to appear that there was sufficient cause for abandoning it. Upon this point the evidence is insufficient. A witness testified that defendant in error left the service of plaintiff on account of abusive language and bad treatment, but this is the opinion of the witness and no evidence that such language was used or that plaintiff's treatment of defendant was bad. The cause upon which defendant in error quit her employment is a fact to be proved by testimony of specific acts of plaintiff toward defendant, and not by such testimony as this. Evidence was given of a demand for wages by defendant upon plaintiff in error with a view to show the latter's acquiescence in the justice of that demand. In our opinion the conduct of plaintiff in error upon that occasion will not warrant such an inference.

The judgment of the probate court is reversed, with costs, and the cause remanded for a new trial.

Reversed.

---

1 278
4 94

TANNATT *v.* THE ROCKY MOUNTAIN NATIONAL BANK OF CENTRAL CITY, COLORADO.

AGENTS — *what signature will bind principal.* If an agent sign a bill of exchange in this form, "T. R. T., agent for S. T.," and there is nothing in the body of the bill evincing an intention to bind the principal, the agent shall be regarded as the drawer of the bill.

EVIDENCE — *to explain the agent's signature.* In such case parol evidence cannot be received to show that the agent intended to bind his principal.

Appeal from District Court, Gilpin County.

HALLETT, C. J., dissented.

Mr. E. T. WELLS and Mr. HUGH BUTLER, for appellant.

Messrs. JOHNSON & TELLER, for appellee.

BELFORD, J. This was an action brought by the Rocky Mountain National Bank against Thomas R. Tannatt, on a bill of exchange, of which the following is a copy:

"BLACK HAWK, Col., *March* 11, 1869.

"At five days' sight pay to the order of Rocky Mountain National Bank, fifteen hundred dollars, value received, and charge the same to account of

"THOMAS R. TANNATT,

"Agent for S. TAYLOR.

"*To* S. TAYLOR, *Providence, R. I.*"

Plaintiff recovered judgment in the court below, and the defendant brings the cause here on appeal.

On the trial, the defendant offered to prove that the bill of exchange was drawn by him in a representative capacity. That, at the time of the drawing of the same, and for a considerable period anterior thereto, he was engaged in carrying on business for Taylor; that he drew the bill of exchange on Taylor, as his agent and not otherwise, and that the bank had full knowledge of this fact.

This evidence was excluded by the court, and is one of the grounds of complaint.

We see no error in the rejection of this evidence. If the defendant is liable as drawer of this negotiable instrument, that liability must be determined by the instrument itself. Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed. When a simple contract, other than

a bill or note, is made by an agent, the principal whom he represents may, in general, maintain an action upon it in his own name, and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. Such evidence does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another. *Nash* v. *Towne*, 5 Wallace, 703.

In the case of *Jones* v. *Littledale*, 6 Adolphus & Ellis, 486, Lord DENMAN, delivering the judgment of the court, lays down this as a general proposition, "that if the agent contracts in such form as to make himself personally responsible, he cannot afterward, whether his principal were or were not known at the time of contract, relieve himself from that responsibility."

In many cases it is held that parol evidence may be introduced to charge an undisclosed principal, but never to exonerate an agent who has made himself personally liable. 2 Smith's Leading Cases, 224 (marginal).

Is Thomas R. Tannatt personally liable on this bill of exchange? "The rule is well settled," says Mr. STORY, "that, as to agents, if they draw or indorse or accept bills in their own names, although on account and for the benefit of their principals, they are held personally liable, because they alone can be treated on the face of the bills as parties. If they would bind their principals, they must draw, indorse or accept the bills in the name of their principals, and sign for them and in their names." It is further added in a note, "that, in order to bind the principal and exonerate himself, the agent should regularly sign thus: 'A B by C D, his agent,' or 'C D for A B.' But in practice there are innumerable deviations from this simple and appropriate form, and the decisions upon the various cases which have arisen in courts of justice involve much conflict of doctrine and opinion, and do not seem always to have proceeded upon any uniform principle of interpretation." See Story on Bills of Exchange, § 97.

In the case of *The City of Detroit* v. *Jackson*, 1 Doug.

115, the judge, in delivering the opinion of the court, after reviewing the numerous cases on the subject, says: "In these and numerous other cases of the same class, the courts have simply looked to the form of the instrument itself in order to ascertain whether it is the contract of the principal or of the agent personally. If, by the terms of the agreement, a party describing himself as agent undertakes to do certain things, *the mere addition of the word 'agent,' or, indeed, any other designation which he may add to his name*, will not make it the contract of his principal. Such addition will be regarded as mere description, and will not have the effect of binding a third person who is not, in form, made a party to the instrument. It is not enough that the person executing an instrument have power as agent to bind a third person, he must, in fact, make it the obligation of that person in terms in order to bind him. A familiar instance of the manner of executing a contract by an agent is found in the case of bank bills. They are, *upon their face, the promise of the corporation by which they were issued*, though signed by the president and cashier with an abbreviation showing only the capacity in which they sign."

In the case of *Tucker* v. *Fairbanks and others*, 98 Mass. 104, GRAY, Judge, says: "The question, whether the defendants are liable upon the face of the bill, requires more consideration. The difficulty is not in ascertaining the general principles which must govern the cases of this nature, but in applying them to the different forms and shades of expression in particular instruments. In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must *not only name his principal*, but he must express, by some form of words, that the writing is the act of the principal, though done by the hand of the agent. If he expresses this, the principal is bound and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the

office and agency, is not sufficient to charge the principal or to exempt the agent from personal liability."

It is claimed that the words, "agent for S. Taylor," fully indicate that Tannatt signed the bill of exchange in a representative capacity, and that the engagement manifests an intent not to bind himself, but to bind the principal. It will be observed, however, that Taylor's name as principal nowhere appears in the body of the instrument. The money was to be charged to Tannatt's account, not Taylor's. The words, "agent for S. Taylor," may be regarded as a mere description of the general relation or office which the person signing the paper holds to another person, without indicating that the particular signature is made in the execution of the office and agency.

"Agent for a particular person," says GRAY, Judge, "may designate either the general relation, which the person signing holds to another party, or that the particular act in question is done in behalf of, and as the very contract of, that other; and the court, if such is manifestly the intention of the parties, may construe the words in the latter sense."

But how is this manifest intent to be learned? Clearly from the whole instrument. In affixing the words, "agent for S. Taylor," it is possible that he designed them as a memorandum, to be used in a settlement he might afterward make with Taylor. The signature of the defendant does not purport to have been made in behalf of a principal. They do not expressan act of agency, as the words "A B" for "C D" would. They are mere description. I agree that no precise form of words is indispensable to the execution of an instrument by an agent for a principal. But it must appear in some way that the instrument is executed in behalf of the principal, or it cannot be his act.

It is not unusual for one who, as surety, executes a joint bond with the principal debtor, to annex to his name the character in which he signs. But then there is no doubt that he is liable to the creditor. Had the signature been

"Thos. R. Tannatt, agent of S. Taylor," it would hardly be contended that it was Taylor's bill of exchange.

But it is claimed that this form of signature has been repeatedly adjudged good by the supreme court of Massachusetts. I admit that it has been so held in *Ballou* v. *Talbot*, 16 Mass. 461, but the decision in that case, while it has been followed there, has not quieted discussion, even in that State. In the case of *Jefts and Wife* v. *York*, 4 Cushing, 371, the signature was "S. D. York, agent for the Freewill Baptist Church," but the body of the note sued on contained the name of the principal, and it was the principal that made the promise, and the case turned upon that fact.

In the case of *Barlow* v. *The Congregational Society, etc.*, 3 Allen, 461, this subject is again considered, and GRAY, J., remarks: "All the decisions of this court upon unsealed instruments, since the case of *Mann* v. *Chandler*, 9 Mass. 335, have required something more *than a mere description of the general relation between the agent and the principal in order to make them the contracts of the latter.*"

Again, he says: "But wherever it appears upon the face of a simple contract, made by an agent of one *named therein*, and whom he can legally bind thereby, that he acts as agent and intends to bind his principal, the law will give effect to the intention in whatever form expressed." "In short, the note not only names the principal, describes the relation between the principal and the agent, and declares the note to be made in execution of the agency, but it cannot take effect according to its terms, except as the note of the principal. As the intention to bind the defendants thus appears upon the face of the note, the judgment must be affirmed."

If, as it has been held in this and in the case in 98 Mass., that the words "Agent for A B" may be taken as a description of the general relation between the agent and the principal, it seems to me a forced construction to say, that a signature in that form must also be taken as indicating a manifest intent to bind the principal.

In the case of *Offut* v. *Ayres*, 7 Monr. 356, the form of the signature was "For B. Ayres, W. B. Ayres," and the court held it to be the note of W. B. Ayres.

In the case of *Webb* v. *Burke*, 5 B. Monr., it is said to be well settled, that if *in the body* of a writing, A B, as agent, binds C D, and then signs it "A B, agent for C D," the writing is that of C D.

In the case of *Cook & Co.* v. *Sanford*, 3 Dana, the note was "One day after date we promise," etc., and signed "V. McKnight for N. B. Cook & Co." The court say, in this case, the words "we promise" show that the promise was intended to be made by a plurality of individuals, and there would be an inconsistency in supposing it to be the agent who promised.

It will be observed, that this cause is not made to rest on the form of the signature, but what appears *in the body* of the instrument, and which unmistakably shows that the principal and not the agent was intended to be bound. See, also, *Downer* v. *Collin*, 26 Ala. 591.

In the case of *De Witt* v. *Wallin*, 4 Seld. 571, the form of the signature was "David Hubbell Hoyt, agent for the churchman." GARDNER, Ch. J., says in commenting on this signature, "It is not sufficient that he describes himself as agent, he must give a right of action against the principal. Here the promise is not by the defendant or the churchman, nor by Hoyt for them or either of them, or in their behalf, but for himself. The formula used by him in the signature to the note in controversy has been determined in this and other States, to create an obligation on the part of the agent personally, and not in behalf of the principal. I can see no good reason for relaxing the principle of these decisions. We may conjecture, that the affix to the name of Hoyt was designed by him to answer some other purpose than simply to designate his person. He may have supposed that it created a contract upon the part of the defendant, or what is more probable, he may have designed it as a memorandum to enable him to determine thereafter from what fund the note should be paid, and to guide him in making up

his account with the churchman or with the defendant personally. *It is sufficient to defeat the action that this purpose is equivocal*, that the language does not necessarily, or by fair and reasonable construction, create an assumpsit on the part of the defendant, whether known as William Walton or as 'the Churchman.' There is no great hardship in requiring, that if one man undertakes to oblige another by note, bill of exchange or other commercial instrument, he should manifest his purpose clearly and intelligibly, or that his principal will not be bound, whatever may be the result in reference to himself."

I am aware that in this case PARKER, J., also delivered an opinion, but I am unable to see that it militates in any degree against the doctrine laid down by Gardiner. At all events in the case of *Fiske* v. *Eldridge*, 12 Gray, 474, this case is quoted with approval. See, also, 98 Mass. 106.

I confess that, after a most careful consideration of the Massachusetts cases, I fail to appreciate the soundness of a rule which declares that the words "agent for" may be taken on the one hand as a description of the general relation which the person signing holds to another, and on the other hand as showing that the particular act in question is done in behalf of, and as the very contract of, that other. If these words are open to this two-fold interpretation, when and how is the proper use of them to be determined? Under what circumstances will the court regard them as words of description, and when as indicating that the particular signature is made in the execution of the office and agency? Is it to be a matter of legal whim and caprice, or is the application to be made under fixed rules on recognized principles? In the case of *Tucker* v. *Fairbanks*, 98 Mass. 106, the court say that the latter construction may be given, when such is manifestly the intention of the parties. The intent to bind the principal, therefore, must be manifest before the courts should construe the words in the latter sense. If this intent is to be derived from the form of the signature, there ought certainly to be some particular shade given to the words by the writer of them, so that we

might learn when they are to be used in the one sense and when in the other. No! we must look elsewhere. Not outside the instrument, because the liability of the drawers of a negotiable instrument must be determined from the instrument itself; but look to the whole instrument and from the body of the contract, taken together with the signature, determine whether it gives a right of action against the principal. If it does, then it exempts the agent; otherwise, he is responsible. If by his act of signing he has left it doubtful whether another or himself is to be bound, the doubt is to be resolved against him, and especially in cases of negotiable paper, where the rule is well settled, that whoever takes it enters into a contract with the parties who appear on the face of it, and cannot look to others for payment. 12 Gray, 481.

While we hold that a person may draw, accept or indorse a bill by his agent, and it will be obligatory upon him as though it was done by his own hand, still the agent, in such case, must either *sign the name* of the principal to the bill, or it must appear on the *face of the bill itself* in some way or other, that it was in fact done for him, or the principal will not be bound. See *Sayre* v. *Nichols*, 7 Cal. 541.

If we look at the body of this bill of exchange there is nothing in it showing any intention to make Taylor liable. To hold him liable, we must rest our judgment wholly on the form of the signature. And we have already shown that a signature of that kind can be taken as a mere description of the relation which the party signing bears to another, or as showing that the particular act in question is done in behalf of, and as the very contract of, that other.

We feel that it is unsafe to adopt this latter construction, unless it appears from the whole instrument that it was the manifest intent of Tannatt to bind Taylor. In my judgment there is nothing manifesting this intent, and the judgment should be affirmed.

My brother Eyster fully concurring with me in this opinion, the judgment below is affirmed.

HALLETT, C. J., dissenting. Appellant was charged as drawer of certain drafts signed by him as follows: "Thos. R. Tannatt, agent for S. Taylor," and the question is, whether he is liable in that character. Appellant appears to have been the agent of Taylor, or at all events he proposed to show upon the trial that he was such agent, and that he had authority from Taylor to draw these drafts If such were the facts, it appears to me that the signature was sufficient to bind Taylor, and relieve appellant from liability. This precise formula has often been held sufficient to bind the principal, and I think that as to these words, the question should be regarded as settled. *Ballou* v. *Talbott*, 16 Mass. 460; *Barlow* v. *Cong. Society of Lee*, 8 Allen, 460; *Tucker Manf. Co.* v. *Fairbanks*, 98 Mass. 101; *Hovey* v. *Magill*, 2 Conn. 680; 1 Am. Lead. Cases (4th ed.), 612, 629, and cases cited. Against these authorities is the opinion of GARDINER, C. J., in *De Witt* v. *Walton*, 9 N. Y. (5 Seld.) 572. In this case PARKER, J., gives another ground for his opinion, and it does not appear whether the other members of the court concurred with him or with the chief justice, and therefore it cannot be said that the court decided in that case that in this method of signing the agent binds himself and not his principal. I think that the weight of authority is against the ruling of the court below, and that the judgment should be reversed.

Affirmed.

ALLEN v. ELDRIDGE.

1 287
3a 295

1 287
7a 297

1 287
d19a 175
19a 177

1 287
f38 412

MARRIED WOMAN — *may recover her earnings.* By chapter 60, Revised Statutes, 454, a husband is deprived of all interest in the labor of his wife, rendered to third persons, and a married woman may maintain an action in her own name to recover her earnings.

MARRIED WOMAN'S *ownership of property must be proved.* Where husband and wife are living together, and there is no evidence as to the ownership of provisions and articles of household use, the presumption is that they belong to the husband.

INSTRUCTIONS — *must be applicable to the evidence.* Where there is no evidence to show that the plaintiff is the owner of personal property, it is error to instruct the jury that if the defendant took and used the property of the plaintiff he is liable to her for its value.

Error to District Court, Jefferson County.

Mr. S. E. BROWNE, for plaintiff in error.

Mr. JOSEPH MANN, for defendant in error.

HALLETT, C. J. The declaration in this case contains the common counts for work and labor, goods sold and delivered, etc., to which plaintiff in error pleaded a set-off and the general issue. The evidence is given in the bill of exceptions, and relates to a sale of goods to plaintiff in error, and work and labor done for him by defendant in error. The evidence shows that defendant in error was, at the time the action accrued, and at the time of trial, a married woman, living with her husband, and it is upon this fact that her right to recover in this action is denied.

At common law this action was not maintainable, and it becomes necessary to inquire whether it is sustained by chapter 60 of the Revised Statutes, entitled "Married Women." That chapter, so far as it relates to the questions to be considered, is as follows:

Sec. 1. "The property, real and personal, which any woman in this territory may own at the time of her marriage, and the rents, issues, profits and proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise or bequest, or the gift of any person except her husband, including presents or gifts from her husband, as jewelry, silver table-ware, watches, money and wearing apparel, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband, or liable for his debts."

Sec. 2. "Any married woman, while married, may bargain, sell and convey her personal property, and enter into any contract in reference to the same as if she were sole."

Sec. 3. "Any woman may, while married, sue and be

sued in all matters having relation to her property, person or reputation, in the same manner as if she were sole."

Sec. 6. "Any married woman may carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used and invested by her in her own name, and she may sue and be sued as if sole in regard to her trade, business, labor, services and earnings, and her property acquired by trade, business and services, and the proceeds thereof, may be taken on any execution against her."

The right of a married woman to the proceeds of her own labor, under this statute, cannot be doubted. The language of the act is clear and explicit, and the husband is deprived of all interest in the labor of his wife, rendered to third persons. It may be contended that the words "on her sole and separate account," in the first clause of section 6, restrict the woman's right to cases in which she declares her intention to appropriate the proceeds of her labor to her own use. But there is little room for such construction. It must be presumed that every one who labors for hire is seeking his own personal emolument; for men do not sow that others may reap. The highest claim to the fruits of labor is vested in him who performs it, and none other need be asserted. We do not doubt the right of defendant in error to recover in her own name the value of her services personally rendered to plaintiff in error, and this, whether the contract for payment is express or implied.

As to the merchandise alleged to have been sold to plaintiff in error, we have greater difficulty. It seems that in the month of July, 1867, defendant in error, with her husband, lived on plaintiff's farm, but not in the house occupied by him. While there, she was engaged by plaintiff in error to keep house for him, and with her husband removed into plaintiff's house, carrying with her a quantity of lard and other articles of household use, which she testified were purchased by plaintiff in error from her. There is no

evidence as to the ownership of these articles, except that they were in possession of defendant in error and her husband. So far as we know, the husband and wife were living together in the full enjoyment of marital rights, and the husband managing and controlling his family affairs. In such case, we think there can be no presumption that articles of food plainly intended for family use are the separate property of the wife. As we have seen, the law gives to a married woman the personal property which she has at marriage, and such as may come to her during coverture, by descent, etc., and such as she may acquire in trade or business, but there is nothing to show that these articles came in any of these ways. In the absence of evidence to show the separate ownership of the wife, the law will presume that they were owned by the husband, there being nothing in this statute to change this common-law intendment. But it may be said that there was an express promise to pay defendant in error for these goods, upon which an action would lie by her and her husband jointly, and, therefore, her suit can only be defeated by plea in abatement. We know that, upon a promissory note or covenant made to the wife during coverture, husband and wife may sue as plaintiffs, and if the wife sue alone, the non-joinder of the husband must be pleaded in abatement. *Gaters* v. *Madeley*, 6 Mees. & Wels. 422; *Bendix* v. *Wakeman*, 12 id. 97; *Dalton* v. *Midland County Railway Company*, 76 Eng. Com. Law, 474. But we have not found a case which goes the length of saying, that a wife may join her husband in an action upon an unwritten promise to the wife, made upon a consideration moving from the husband. Nor do we propose to discuss this question, for we are not able to ascertain from the evidence that there was an express promise to defendant in error, rather than her husband. She testifies that plaintiff in error promised to pay her, but the plaintiff denies it. And if we concede that her statement is true, it by no means follows that there was an undertaking to pay the wife instead of the husband. One who is dealing with a wife, acting for her husband, will ordinarily

address her in the second person singular, without any intention to engage with her instead of her husband. So a purchaser of dry goods will promise payment to the owner's clerk, but no lawyer would bring an action upon such promise in the name of the clerk. To enable a wife to join with her husband in an action upon an undertaking, the engagement must have been with her distinctly and unquestionably, and the evidence in this case does not show such an undertaking. Again, the jury were not instructed that an express undertaking to pay defendant in error for this merchandise was essential to her right of recovery; but they were told, that if plaintiff in error took and used the property of defendant in error, he was liable to her for its value. The instruction, as an abstract proposition of law, is not to be denied, but it is not applicable to the facts of this case. There was nothing to show that defendant in error owned the goods, and under this instruction the jury may have given undue weight to the evidence. The judgment of the district court is reversed with costs, and the cause is remanded.

Reversed.

JONES v. CARRUTHERS.

DIMINUTION OF RECORD — *will not be noticed if error appear.* A bill of exceptions in the record was not questioned, but it was alleged that another bill of exceptions remained in the court below. Error appearing in the bill of exceptions contained in the transcript on file a suggestion of diminution of the record will not be noticed.

DEPOSITIONS — *taken without notice.* Unless notice of the time and place of taking depositions be given to the opposite party, they cannot be read upon the trial of the cause.

Error to Probate Court, Park County.

Mr. L. C. ROCKWELL, for plaintiff in error.

Mr. J. MARSHALL PAUL and Mr. S. E. BROWN, for defendant in error.

HALLETT, C. J. This cause was submitted to the court upon the twenty-eighth day of July last, and the parties then entered into a written stipulation to the effect that the plaintiff in error should file abstracts and copies of his arguments by the first day of October following, and that the defendant in error should join in error and file copies of his argument by the first day of November following. The argument of counsel for plaintiff in error was filed on the thirtieth day of September last, according to the terms of the agreement, but no argument upon the error assigned has been filed by counsel for defendant in error. We find among the papers in the cause a suggestion of diminution of the record filed October 31, 1870, which charges that a bill of exceptions, differing from that now before us, has been omitted from the transcript of the record. Nothing is said as to the nature of the difference between the omitted exceptions and those now before us, nor is it alleged that the bill of exceptions given in the transcript of the record on file in this court is incorrect in any particular. Accepting the present exceptions, which we find in the transcript, as truly taken, we perceive that there is error in the record, and therefore it is not necessary to await the production of other portions of the record. Upon the trial of the cause, certain depositions were read in evidence on behalf of defendant in error, and it does not appear that plaintiff in error ever had notice of the time and place of taking such depositions. It is hardly necessary to say that depositions of witnesses cannot be given in evidence unless notice be given of the time and place of taking them, according to the provisions of the statute. Counsel for plaintiff in error objected to the reading of these depositions upon the trial below, and excepted to the ruling of the court in admitting them to be read in evidence, and therefore he may renew his objection here.

The judgment of the probate court is reversed, with costs, and the cause is remanded.

Reversed.

GALLUP et al. v. WILDER et al.

1 [illegible]
Case 1
29 157

1 293
c61 288

PRACTICE — *assessing damages on default.* In trespass *de bonis* upon defaulting the defendant, the damages must be assessed by a jury.

Error to Probate Court, Fremont County.

Messrs. CHARLES & ELBERT, for plaintiff in error.

Per CURIAM. This was an action of trespass *de bonis asportatis*, brought by George G. Wilder and others, as trustees of "The Colorado Oil Association," against Francis Gallup et al. There was a judgment taken in the court below by default, and the damages assessed without the intervention of a jury. In a case of this kind the assessment of damages by the court was clearly erroneous. A jury should have been called. See the case of *Jones* v. *Stevens*, *ante*, 67, decided by this court. The judgment of the court below is reversed and remanded for further proceedings.

Reversed.

FOSTER v. THE PEOPLE.

CONSTRUCTION *of section 43 of Criminal Code, relating to mayhem.* The effect of the proviso in section 43 of the Criminal Code (Rev. Stat. 202) is to reduce the crime in certain specified cases from a higher to a lower grade.

MISDEMEANOR — *conviction may be had upon indictment for felony.* A conviction for misdemeanor may be had upon an indictment for felony in case where the misdemeanor is included in the higher offense.

INDICTMENT *for mayhem need not negative circumstances mentioned in proviso to section 43.* An indictment for mayhem, in which the fact and the intent are charged, is good for the principal crime, mentioned in section 43, and also for the misdemeanor mentioned in the last clause of that section.

INSTRUCTION *erroneous as to higher offense, but not as to the lesser.* The jury were instructed that, if the injury was inflicted during a fight between the prisoner and the prosecuting witness had by consent, and the prisoner was the assailant, or the prosecuting witness declined further combat at the time the fact occurred, the prisoner was guilty. This charge, if applied to the higher offense, is erroneous, but, if applied to the inferior offense, it is too favorable to the prisoner.

VERDICT OF GUILTY — *a conviction of the inferior offense.* The evidence being clear that the prisoner bit off the ear of the prosecuting witness during a fight between them, assuming that the jury intended to find that the fight was by consent, which is the view most favorable to the prisoner, the verdict is still sufficient for the misdemeanor defined in the last clause of the proviso to section 43.

PRACTICE — *error in entering judgment.* The judgment of the district court, being for the higher offense, was set aside, and the court below was directed to pronounce judgment on the verdict for the misdemeanor specified in the last clause of section 43 of the Criminal Code.

Error to District Court, Arapahoe County.

Messrs. CHARLES & ELBERT, for plaintiff in error.

Mr. V. D. MARKHAM, for defendant in error.

HALLETT, C. J. The indictment in this case is founded upon section 43 of the Criminal Code, which reads as follows:

"Mayhem consists in the unlawfully depriving a human being of a member of his or her body, or disfiguring or rendering it useless. If any person shall unlawfully cut out or disable the tongue, put out an eye, slit the nose, ear or lip, or disable any limb or member of another, or shall voluntarily and of purpose put out an eye or eyes, every such person shall be guilty of mayhem, and on conviction shall be punished by confinement in the penitentiary for a term not less than one year nor more than three years; provided that no person shall be found guilty of mayhem where the fact occurred during a fight had by consent, nor unless it appear that the person accused shall have been the assailant, or that the party maimed had, in good faith, endeavored to decline further combat; but, in all other cases where the fact shall happen in actual fight, the party accused, being thereof duly convicted, shall be adjudged guilty of a high misdemeanor, and punished by imprisonment in the penitentiary not exceeding one year, and be fined not exceeding one thousand dollars."

Our first duty is to ascertain the true meaning of the proviso in this section which has been the subject of much discussion at the bar, and by which the sufficiency of this

record is to be tested. In the first place, it is to be observed that in that part of the section which precedes the proviso, mayhem is defined and punished by imprisonment for a term of not less than one year nor more than three years. If the proviso were struck out of the section the crime and its punishment would remain clearly ascertained; but it is said, that the proviso creates an exception in the statute, which ought to have been negatived in the indictment. In the printed copy of the statute a period is inserted after the word "combat," and thus the proviso is divided into two sentences, while it is very evident, from the language used, that but one was intended. If mistakes of this kind were less common it would hardly be necessary to comment upon the necessity of overlooking this one, and I shall pass to the consideration of the proviso, as if it were properly punctuated. Reading the proviso connectedly, we find in the first place that no person shall be found guilty of mayhem where the fact occurred during a fight had by consent, concerning which it is only necessary to remark that the reference is to the crime of mayhem as previously defined and punished. The language of the proviso then succeeding is as follows: "Nor unless it appear that the person accused shall have been the assailant, or that the party maimed had in good faith endeavored to decline further combat."

The negative particle which connects this clause with the preceding, shows that this also is a limitation upon the crime defined and punished in the clause which stands before the word *provided*. These two clauses of the proviso being connected by the disjunctive *nor*, we cannot say that either limits or qualifies the other, but both of them must be regarded as qualifying what comes before them. We come now to the third and last clause of the proviso, beginning with the words, "but in all other cases where the fact shall happen in actual fight," etc, and this, it will be observed, is not a denial or limitation of any thing which stands before it. It is a substantial clause prescribing a punishment different from that first mentioned, in certain cases "where the fact shall happen in actual fight." Now, we cannot say

that the "other cases where the fact shall happen in actual fight," here referred to, are those previously mentioned in the proviso, because certain of those thus mentioned, to wit: the cases in which the party maimed declines the combat before the fact, are expressly included in the punishment first prescribed.

Another construction is, however, open to us, which is so reasonable and just, and accords so perfectly with the import of the language, that we do not hesitate to adopt it. By the terms of the preceding clauses, where the injury is inflicted during a fight, had by consent, and where the accused was not the assailant, and the injured party did not decline combat before the fact, the offender is not punishable according to the provisions of the first part of the section, and these are the *other cases* referred to in the last clause of the proviso. The cases excepted out of the first part of the section, on account of the mitigating circumstances attending them, are visited with milder punishment. The only effect of the proviso, then, is to reduce the offense in certain specified cases, from a higher to a lower grade. Whether the higher offense is a felony, appears to be an open question. *Commonwealth* v. *Newell*, 7 Mass. 244. But this is not important, except with reference to the old rule, that a conviction for misdemeanor could not be had upon an indictment for felony. As we are not disposed to adopt that rule, it seems unnecessary to inquire whether mayhem is felony under our law. Upon the point that a conviction for misdemeanor may be had upon an indictment for felony in cases where the misdemeanor is included in the higher offense, counsel are referred to *People* v. *Jackson*, 3 Hill, 92; *Stewart* v. *State*, 5 Ohio, 145. Upon what has been said of the interpretation of the statute, we are now prepared to speak of the sufficiency of this indictment. The criminal acts prohibited by the law are: cutting out or disabling the tongue, putting out an eye, slitting the nose, ear or lip, and the circumstances attending the act, as whether it be done in a fight had by consent, whether the accused

were the assailant, etc., determine the nature and aggravation of the crime and the punishment to be administered.

The acts prohibited are criminal in a degree determinable by the circumstances attending them. Now it is always sufficient in pleading to charge the fact, leaving matters of excuse to come in by way of defense. Mr. STARKIE says "that no indictment is sufficient which alleges an act or omission in itself innocent, unless it proceed to disclose circumstances which render such act or omission illegal," and it would be difficult to find a better statement of the rule. But when the act is in itself criminal, it is sufficient to charge it, leaving the prisoner to excuse himself if he can. In *Rex* v. *Pemberton*, 2 Burr. 1036, the rule is laid down as follows: "It is enough for the prosecutor to bring the case within the general purview of the statute, upon which the indictment is founded; if that statute has general prohibitory words in it. For where an indictment is brought upon a statute which has general prohibitory words in it, it is sufficient to charge the offense generally in the words of the statute, and if a subsequent statute or (as Mr. Justice FOSTER and Mr. Justice WILMOT, who spoke after Lord MANSFIELD and Mr. Justice DENNISON, added), even a clause of exception, contained in the same statute, excuses persons under such and such circumstances, or gives license to persons so and so qualified so as to excuse or except them out of the general prohibitory words, *that* must come by way of plea or evidence, that the party is not within such general prohibition but excepted out of it."

So Mr. CHITTY (1 C. L. 231 *a*), "In general all matters of defense must come from the defendant and need not be anticipated or stated by the prosecutor."

See, also, *Commonwealth* v. *Hart*, 11 Cush. 130. The application of this rule to the case under consideration is obvious. The act prohibited by the law and charged in this indictment is biting off the ear of the prosecuting witness Thompson, and this act is criminal in a high or low degree, according to the relations of the parties, as whether they were in combat,

etc., at the time of the injury. In either case, the prosecutor can do no more than charge the fact with the intent, because this is all that is necessary to make out the crime. To require the pleader to negative the circumstances, which would reduce the crime to the lower grade, would be to anticipate the defendant's case, and this is as unnecessary as it is unreasonable.

We think that the indictment is good, not only for the principal crime, but also for the misdemeanor defined in the last clause of the proviso. As before observed, the criminal act is the same whatever the circumstances attending its commission. It is like a case of homicide which may be murder or manslaughter, according to the relations of the prisoner and deceased at the time of the fact. As we have seen, the pleader could not do more than negative the circumstances which will reduce the crime, and if this had been done the indictment would still be good for the smaller offense. The greater includes the less, and the indictment without such negative averments must still be good for the smaller offense.

Upon the trial below, the jury were instructed that if the injury was inflicted during a fight between Foster and Thompson, had by consent, and Foster was the assailant, or Thompson declined the combat at the time the fact occurred, the accused was guilty. Considered with reference to the higher crime, this charge does not conform to the views expressed in this opinion, but applied to the inferior offense, the charge is too favorable to the plaintiff in error. There is evidence tending to show, and probably the jury found, that Thompson, the prosecuting witness, entered into the combat voluntarily. That Foster and Thompson did fight, and that during the struggle the former bit off the ear of the latter, under circumstances peculiarly atrocious, is upon the evidence beyond all doubt. Whether the fight was by consent is not so clear, but upon the evidence and the instructions of the court the jury may have found that fact. Assuming that the jury intended to find that the fight was by consent, which is the view most favorable to the plaintiff in error, this ver-

dict is still sufficient for the misdemeanor defined in the last clause of the proviso. Beyond all doubt he is guilty of the inferior offense, and admitting the full force of every objection that he makes to this record, he stands convicted of it. The new testimony which he desires to introduce upon another trial of the cause would not free him from this guilt, and therefore it would be useless to give him an opportunity to present it. The judgment of the district court is too large, and therefore it must be reversed and set aside. But the ends of justice do not require that another trial of the cause shall be had, and therefore the district court of Arapahoe county is directed to enter judgment upon the verdict of the jury, as for the misdemeanor mentioned in the last clause of section 43 of the Criminal Code, and the said plaintiff in error shall attend before said district court on the first day of the next term thereof, and from day to day thereafter until discharged by that court, in order that judgment may be pronounced against him.

Reversed.

DEITSCH v. WIGGINS et al.

1 299
1 252
1 256
1 299
12 11
1 299
14 535
1 299
17 67

TRESPASS — *plea of justification.* In trespass *de bonis* against an attaching creditor who justifies under the writ he must aver and prove a debt due from the attachment defendant to him.

PLEADING — *must be good as to all.* If two or more in pleading join in a defense which is sufficient for one but not for others, the plea is bad as to all.

The sheriff who levied the writ of attachment joined with the attaching creditor in a plea of justification insufficient as to the latter, and the defense was not available to either of them.

PLEA DEFECTIVE — *issue thereon.* A plea defective in substance is not cured by joining issue thereon unless the defects are supplied in the replication.

Plea defective in substance. A plea substantially defective presents no defense to the action, and evidence of the facts alleged therein, or of those omitted therefrom, cannot be received although issue is joined thereon.

In trespass *de bonis* by a vendee of goods against creditors of the vendor, who have taken the goods in attachment, the latter cannot show that an agent who made the sale acted without authority from the vendor, unless they also show a debt due from the vendor to them.

PLEA OF JUSTIFICATION *must be special.* In trespass *de bonis* the defense that the goods were taken under attachment against a third person is not admissible under the general issue.

MEASURE OF DAMAGES *in trespass.* In trespass *de bonis* the plaintiff may recover the highest market price of the goods taken.

Appeal from District Court, Gilpin County.

TRESPASS by the vendees of merchandise against creditors of the vendor, who had taken the goods in attachment and the sheriff who levied the writ.

The pleadings are sufficiently stated in the opinion of the court.

P. M. Martin testified, that the goods were taken by the sheriff from the possession of appellee's agent, and that he invoiced the goods by the direction of the sheriff, at cost and freight added; that the invoice price was $2,315.90; that the goods might be sold for this amount with good management; but that he did not think them worth more than seventy-five cents on the dollar of the invoice price; that he would not give more than that amount; but that it would not be difficult to get cost for them, that the cash valuation is the amount added upon the invoice.

Charles C. Post testified, that he was present when the goods were taken away, and saw the sheriff and appellant there, that appellant was engaged in selecting the goods from the shelves as they were being packed.

Defendants below offered to prove, by Charles E. Sherman, that the goods taken were part of the stock of merchandise of Oliver S. Buell, who did business under the name and style of O. S. Buell & Co.; that the witness, Charles E. Sherman, was the clerk of said O. S. Buell for the space of about six months prior to the 6th day of May, 1867; that for two or three months prior to the 2d or 6th day of May, 1867, the said Buell was absent from the said territory of Colorado; that during the absence of the said Buell, said Sherman was the clerk of said Buell, to carry on the regular business of said Buell in Central City, which was retailing clothing and merchandise; that the

said Sherman had no right or authority whatever to sell or dispose of the entire stock of goods of said Buell, but was only authorized to sell in the regular course of business; that on the 29th day of April, 1867, John Q. Hart, agent of the plaintiffs, well knowing that the said Sherman was not authorized to sell the entire stock of goods, fraudulently agreed and combined and confederated with the said Sherman to make a pretended purchase of the entire stock of goods, for the purpose of hindering, delaying and defrauding the defendants, Moritz Deitsch, Isidor Deitsch and Jonas Deitsch, defendants herein, and other creditors; that the said Hart well knew that the said Jonas Deitsch, Moritz Deitsch and Isidor Deitsch were creditors of said Buell to a large amount, and that such sale was designed by him to cheat, hinder and defraud said defendants; that said stock of goods was worth $10,000, but was sold to said Hart, Wiggins & Co., for a grossly inadequate sum; that whatever money was paid, if any, or securities given, were so concealed, smuggled and managed as to protect and place it beyond the reach of the defendants and for the benefit of the said Buell, Hart, Wiggins & Co., John Q. Hart and said Sherman, to which evidence plaintiffs objected, and the court sustained the objection.

Defendants then offered the affidavit, bond and sheriff's return in the suit of Deitsch & Bros. against Buell, to which plaintiffs objected, and the objection was sustained.

The court gave the following instructions to the jury at the request of the plaintiffs below:

The court is asked to instruct the jury, that the defendants are not entitled to have the goods and chattels taken by them appraised or valued at the wholesale price, but the jury may find the goods and chattels of the value they would bring in market at retail.

If the jury believe, from the evidence in the case, that before the commencement of this suit the plaintiffs were possessed of a quantity of personal property, and the defendants, William Z. Cozens and Moritz Deitsch, took the said goods and chattels, and carried the same away

without the consent of the plaintiffs, such acts were acts of trespass.

The court instructs the jury, that, when the goods of another are taken without his consent, and against his will, and it is shown that the taking was wrongful, the highest market price or value of the goods so taken, at the time of the taking, will be allowed to the owner.

If the jury believe, from the evidence, that, at the time defendant, Cozens, was packing up the goods and chattels mentioned in the declaration, Moritz Deitsch was there, assisting in selecting the same, without the consent of plaintiffs, then he was guilty of trespass, and, if he had the consent of plaintiffs, it is incumbent on the defendant Deitsch to prove such consent.

The court instructs the jury, that if they believe, from the evidence, that the goods mentioned in the declaration were in the possession of the plaintiffs at the time of the taking of the goods by the defendants, or either of them, if said goods were taken by them, or either of them, the law presumes they, the said plaintiffs, were the owners of said goods, and it is incumbent on the defendants to rebut that presumption by proof that they were not the goods of the plaintiffs, and if said defendants have failed to make such proof, they should find for the plaintiffs such sum as, by the evidence, such goods were shown to be worth.

On behalf of defendants the court gave the following instruction:

To enable the plaintiffs to recover against the defendants in this action, the plaintiffs must show, by evidence to the jury, that the said plaintiffs, at the time of the taking, were rightfully in possession or entitled to the possession of the property alleged to have been taken as against the defendants.

And the said defendants also moved the court to give the jury the following instructions:

Unless the jury believe, from the evidence, that defendant, Moritz Deitsch, was present, in some way aiding, counseling and abetting the taking of the goods in question, they will find defendant, Moritz Deitsch, not guilty.

The jury are instructed by the court, that, to enable plaintiffs to recover in this action, plaintiffs must, at the time of such taking, have had rightful possession of the premises in question.

If the jury believe, from the evidence, that Moritz Deitsch was present at the time of the alleged taking of the goods in question, but that he neither counseled nor took any part in said taking, they will find defendant, Moritz Deitsch, not guilty.

But the court refused to give said instructions, and defendants excepted.

Messrs. ROYLE & BUTLER, for appellant.

Messrs. JOHNSON & TELLER, for appellees.

BELFORD, J. This was an action of trespass, *de bonis asportatis*, commenced by appellees against William Z. Cozens and Moritz Deitsch, Isidor Deitsch and Jonas Deitsch in the district court of Gilpin county, in which the appellees recovered a judgment against said William Z. Cozens and Moritz Deitsch for the sum of $2,315.90, and from this judgment Deitsch appeals. The declaration alleged that the defendants took and carried away certain goods and chattels in the declaration mentioned, on the 4th day of May, 1867, of the value of $2,315.90.

The defendants jointly plead the general issue, and also a special plea alleging that the goods and chattels in the declaration mentioned were the goods and chattels of O. S. Buell & Co., on the said 4th day of May, 1867, and that, on the 3d day of May, 1867, a writ of attachment was issued out of the district court of Gilpin county in favor of the firm of Deitsch & Bro., directed to the sheriff of said Gilpin county, commanding him to attach so much of the estate, real and personal, of the said O. S. Buell & Co., as should be of sufficient value to satisfy the sum of $1,478.90, and costs; that, on the said 3d day of May, 1867, the said William Z. Cozens was sheriff of Gilpin county; that, on said day, the writ of attachment was delivered to said Cozens to

execute, and that, on the 4th day of May, 1867, he levied upon the goods and chattels mentioned in the declaration as the property of the said O. S. Buell & Co., by virtue of said writ of attachment, which were the supposed trespasses complained of. Appellees filed several replications, denying that the goods and chattels mentioned were the property of O. S. Buell & Co., on the 4th day of May, 1867; also denying that the writ was issued as alleged in said plea, and that Cozens levied upon said goods under and by virtue of such writ, and that Cozens was sheriff of Gilpin county. The above is a brief and, we believe, a correct abstract of the pleadings. During the progress of the trial, the defendants offered in evidence a certain affidavit, bond and writ of attachment, and sheriff's return indorsed thereon, in case of Moritz Deitsch, Jonas Deitsch and Isidor Deitsch, against said Oliver S. Buell & Co., then pending in said court, and being the writ of attachment under which the defendants sought to justify. To the introduction of this evidence the plaintiffs objected. The objection was sustained and the defendants excepted. The action of the court in excluding this evidence is the principal matter complained of.

It is urged by the appellant that the appellee, having joined issue on the special plea, was by the joinder precluded from objecting to the introduction of evidence under it; that the filing of the replication cured whatever defects existed in the special plea. Under the ruling of the court below three questions present themselves. First, was the special plea defective in substance? Second, did the appellee, by pleading over, waive any substantial defects that existed in the special plea? Third, the plea being defective, could the appellees object to the introduction of evidence under it? It must be admitted, at least it will so appear after a careful examination, that there is no allegation in the special plea that O. S. Buell & Co. were, at the time of the alleged trespass, indebted to Deitsch & Bro. Giving the plea the most liberal construction, it simply avers that on the 3d day of May, 1867, a writ of attachment was issued

out of the district court of Gilpin county, at the suit of Moritz Deitsch, in favor of said Moritz Deitsch, Isidor Deitsch and Jonas Deitsch, partners doing business under the firm name of Deitsch & Bro., and which said writ commanded the sheriff to attach as much of the estate, real and personal, of Oliver S. Buell & Co., as should be of the value sufficient to satisfy the sum of $1,478. ' It might be inferred that this sum of money was due from Buell & Co. to Deitsch & Bro., but it is not so averred. The omission to aver an indebtedness we regard as a substantial and fatal defect. When a creditor, sued in trespass by a vendee of goods, contests the plaintiff's title on the ground of fraud, if he justifies under a writ of attachment against the vendor he must show a debt against him, or a judgment if he justifies under an execution. *Damon* v. *Bryant*, 2 Pickering, 411, and authorities cited; *Noble* v. *Holmes*, 3 Hill, 194. There was no allegation of an existing debt in the plea, nor was there any offer made to prove one on the trial. The plea is bad for another reason. It does not show that an affidavit was filed before the writ was issued, nor does it show the return of the writ. *Davis* v. *Bush*, 4 Blackford, 330. But there is still another objection which we regard as fatal, and one that applies equally to Cozens & Deitsch. They both joined in the special plea. In the case of *Moors* v. *Parker et al.*, 3 Mass. 310, it is held, that when several defendants join in pleading in bar, if the plea is bad as to one defendant it is bad as to them all. The rule on which it is founded is correctly laid down in 1 Saund. 28, n. 2. "If two or more in pleading join in a defense which is sufficient for one but not for others, the plea is bad as to all — for the court cannot sever it, and say that one is guilty and the others not, when they all put themselves upon the same terms." This is upon the principle that a plea is entire and not divisible, and, therefore, if bad in part is bad in whole.

In the case of *Bradley* v. *Powers*, 7 Cow. 330, it is held, that when two plead a justification jointly or a plea involving a justification which fails as to one, the plea, being entire, fails as to both. To the same effect is *Middleton* v. *Price*,

11 Strange, 1184, and see *Merrill* v. *Forbes*, 5 Wend. 238. Were it deemed necessary, authorities on this point might be greatly multiplied. The plea being thus substantially defective, was it cured by pleading over? We think not. A judgment entered on the plea could have been arrested. While all merely formal defects in a pleading are aided and cured by pleading over, except on special demurrer, assigning this for cause, yet such defects as would be fatal on general demurrer are not aided or cured by pleading over. Gould on Pleading, § 11, p. 496. While a plea that states a fact, but states it defectively, would be cured by pleading over, still the authorities nowhere hold, that an omission to state a substantial and material fact will be cured by pleading over, unless the party replying to the plea affected by the omission supplies the omitted fact by setting it up in his own plea. If one party expressly avers a material fact, before omitted on the other side, the omission is cured. For the defect in the pleading of the one party is thus supplied by the other; and it may thus appear from the pleadings on *both* sides taken together, that he, on whose part the omission occurs, is entitled to judgment, although his own pleading, taken *by itself*, be insufficient. Thus, when in trespass the plaintiff complained of the defendant for taking a certain iron hook without alleging possession in himself (which in that action is material), the defendant's plea, in which he confessed and justified the taking of the hook from the *plaintiff's hand*, was held to aid the declaration, inasmuch as it expressly *acknowledged* the plaintiff's possession. Gould on Pleading, § 192, p. 166.

The special plea being defective, could the plaintiff below object to the introduction of evidence under it?

It is claimed by the appellant that the plaintiff below, having failed to demur, and having joined issue on this plea, was estopped from objecting to the introduction in evidence of matters alleged in it. If the plea was substantially defective, and so we adjudge it to be, and was not cured by pleading over, then it was no defense to the action, and being no defense to the action, it was entirely competent

for the court to disregard it and exclude the evidence sought to be introduced under it. *Kemp* v. *Moundel*, 9 Leigh, 12. The mere fact that a party joins issue on a plea fatally defective does not and cannot impose upon a court the duty of hearing and admitting evidence under it, when it becomes apparent that no judgment could be sustained if rendered on such plea. Having said this much on the subject of the special plea, it is proper to inquire, whether, under the general issue, it was competent for the defendants to introduce in evidence the writ of attachment with the affidavit annexed. In the case of *Rosenburg* v. *Angel*, 6 Mich. 509, it is said: "In trespass *de bonis*, the defense that the goods were taken under attachment against a third person, alleged to be the owner, is not admissible under the general issue."

The same rule is laid down in Chitty's Pl., vol. 1, p. 500, 502. In an action for trespass for injuries to real or personal property, the plea of not guilty puts in issue the trespass alleged in the place mentioned, and operates as a denial of the plaintiff's possession or right of possession. The substance of the declaration is, that the defendant has forcibly and wrongfully injured property in the possession of the plaintiff, and under the general issue the plaintiff must prove, first, that the property was in his possession at the time of the injury, and this rightfully as against the defendant. Second, that the injury was committed by the defendant with force. Under the general issue the defendant may give in evidence any facts tending to disprove either of the propositions which we have seen the plaintiff is obliged to make out to maintain his action. Every defense which admits the defendant to have been *prima facie* a trespasser must be pleaded specially, but any matters which go to show that he never did the act complained of may be given in evidence under the general issue. Puterbaugh's Pr. 464. In the extended examination given this subject, we have found but two cases where proof tending to justify a trespass has been allowed to be introduced under the general issue. The first is the case of

Anthony v. *Gilbert*, 4 Blackf. 348, in which the supreme court of Indiana held, that "the defendant may show, in mitigation of damages, under the general issue, that the goods at the time of taking belonged to a third person, and that the *plaintiff was not liable for them to the owner*."

In the case of *Squire* v. *Hallenbeck*, 9 Pick. 551, it is held that "in trespass *de bonis asportatis* the defendant may prove, in mitigation of damages, that the goods did not belong to the plaintiff, and that they came *to the use of the owner*, although in taking them the defendant acted without authority." But the ruling in each of these cases is made to rest on special grounds. In New York, by statutory provision, the plea of not guilty is equivalent to a plea of justification. *Merrill* v. *Forbes*, 5 Wend. 239. It is further claimed by the appellant that the court erred in refusing to allow the defendants below to introduce proof of Sherman's want of authority to sell the goods to Hart, Wiggins & Co. It must be borne in mind, that Deitsch's interference with the property in controversy could only be justified on the ground that he was a creditor; that he had a valid subsisting debt against O. S. Buell & Co., and that, as such creditor, he was assailing the title of Hart, Wiggins & Co. These matters could only be introduced under a special plea, and we have already held that the special plea was fatally defective and no proof could be admitted under it. It is therefore not necessary for us to discuss or decide whether the sale made by Sherman to plaintiffs below was a valid sale, or whether it could or ought to be upheld against existing creditors of Buell. It is further urged by the appellant that the court below erred in the instructions given the jury on the subject of damages. We have carefully considered this point and find no error. In the case of *Anthony* v. *Gilbert*, *supra*, it is said: "We know of no standard by which damages in action of trespass can at all times be measured. The nature of the injury complained of renders it impracticable to establish such a rule. the first inquiry should be the amount of injury actually sustained, which, together with interest, is a good general

measure of damages in the absence of circumstances of aggravation. But to limit the investigation to the pecuniary loss of a plaintiff would frequently do him injustice, and always to extend it beyond such loss would as often be unjust to the defendant." If, however, we confine the measure of damages to the value of the property when taken, we see no injury sustained by the defendant for the reason that the damages assessed by the jury did not exceed in amount the value of the goods as fixed by the evidence.

We have carefully considered the other objections urged, and find no reasons why the judgment should be reversed.

Judgment affirmed, with costs.

Affirmed.

FARNUM *v.* UNITED STATES.

AMENDMENT *of caption of indictment.* If in the caption of an indictment the court is misdescribed, it may be amended on motion of the district attorney.

INDICTMENT *for secreting or embezzling letters — description of letters.* In an indictment against a mail carrier, for secreting or embezzling letters deposited in the mail, and intrusted to him to be carried, it is not necessary to describe the letters by stating to whom they were addressed, and by whom they were written.

CONSTRUCTION *of section* 12, *act of* 1864 — *what is an offense by mail carrier.* A mail carrier who secretes, embezzles or destroys a letter, packet, bag, or mail of letters intrusted to him to be carried, offends against the first clause of section 12 of the act of 1864 (13 Stat. at Large, 336), and if the letter, packet, bag or mail of letters contain any article of value, he offends against the last clause of that section.

INDICTMENT *under section* 12, *act of* 1864 — *what it must contain.* In order to convict under the last clause of that section, it must be alleged in the indictment that the letter, packet, bag, or mail of letters contained an article of value.

EVIDENCE — *under same section.* And the evidence must support the allegation at the trial.

PRACTICE — *where the conviction was proper, but the law was misapplied.* Where the law of the case was misconceived in the court below and the judgment is erroneous, a new trial will be granted, although the evidence was sufficient to warrant a conviction upon two counts in the indictment.

Error to District Court, First Judicial District.

THE indictment was entitled, "The district court of the United States of America, within and for the first judicial district of Colorado territory, of the term of June, in the year of our Lord one thousand eight hundred and seventy. At a regular term of the district court of the United States of America, within and for the first judicial district of Colorado territory, begun and held at Denver City, on the fourteenth day of June," etc., etc.

The defendant below moved to quash the indictment, upon the ground that it was entitled of a court not known to the law. He also objected, that there was no offense charged. The district attorney filed a cross-motion to amend the caption of the indictment by striking out the words "of the United States of America," so as to make the same read "the district court within and for the first judicial district."

Defendant's motion was overruled, and the cross-motion allowed. The evidence and the indictment are sufficiently set forth in the opinion. The jury found the defendant guilty.

Messrs. BROWN, HARRISON & PUTNAM, for plaintiff in error.

Mr. L. C. ROCKWELL, U. S. District Attorney, for defendant in error.

BELFORD, J. The defendant was indicted at the July term, 1869, of the Arapahoe district court, for secreting and embezzling one package of letters and two sacks of gold dust, with which he had been intrusted, as mail carrier, and which were intended to be conveyed by post. There are seven counts in the indictment, all charging the same offense, but in the first, sixth and seventh counts, the defendant is charged as a carrier of the mail on the route from Fairplay to Helena, and as being then and there a person employed in a department of the post-office establishment

of the United States. The defendant moved to quash the indictment for error in the caption, whereupon the attorney-general filed a cross motion and asked leave to amend the caption, which leave was granted, and the motion to quash overruled. The defendant then entered a plea of not guilty, and was put upon his trial. The jury found him guilty on the first, third, sixth and seventh counts, and not guilty on the second, fourth and fifth counts. Motions for new trial and in arrest of judgment were overruled.

The first error assigned is the overruling of the motion to quash and permitting the attorney-general to amend the caption of the indictment. It is claimed by the plaintiff in error, that the caption is a part of the indictment, and cannot be amended. In this view we are unable to concur. Bishop in his work on Criminal Procedure, vol. 1, sec. 151, says: "In matter of legal principle, this extended commencement or caption is no part of the indictment, as sworn to by the grand jury; it is a mere formal statement, which, though placed at the head of the indictment, is still of no higher nature than is an entry on the docket, made in court by the clerk — a thing, which, if erroneous, is subject like a docket entry to be corrected by an order of the judge, or, when it becomes transferred into the permanent records, to be amended to the same extent as any other part of those records. And it is believed, that though the decided cases may not be very distinct to this effect, and though some of them may even seem to come short, this doctrine is, on the whole, sustained by adjudged law."

In Archibald's Criminal Practice, vol. 1, page 260, it is said: "But, though the caption, like the indictment itself, may, if defective, be either quashed by the court or demurred to on the part of the defendant, it differs materially from it in its capacity of amendment, for the return to the court is merely a ministerial act and ministerial acts may be amended at any time according to the common law."

In the case of the *United States* v. *Thompson*, 6 McLean, 57, the same objection urged to this indictment, namely, "that the court is not properly entitled," was passed upon,

and Judge WILKINS says: "We consider that this objection has been long settled, both in England and in this country." The caption forms no part of the indictment or presentment of the grand jury, and he adds: "It is only matter of astonishment, that such a technical exception should now be gravely urged in court." *Moody* v. *The State*, 7 Blackf. 424; *The State* v. *Gilbert*, 13 Vt. 647.

Before proceeding to examine the action of the court in overruling the motion for new trial, and in arrest of judgment, it may be proper to allude to some objections made to the form of the indictment. It is claimed by the plaintiff in error, that the indictment is bad, because it fails to describe the letters which it is alleged the defendant secreted and embezzled. In the case of the *United States* v. *Lancaster*, 2 McLean, 433, the court say: "Is it essential that the letter charged to have been embezzled should be described by stating to whom it was directed, and by whom it was written? This description is generally given when it is procurable. But it is seldom in the power of the prosecuting attorney to state these facts, much less to prove them. A post-master or carrier, after having stolen a letter from the mail, will not be likely to preserve it as the evidence of his guilt. When the act is done deliberately, as may be presumed to be the case, generally, when done by a post-master there is not one instance in a thousand perhaps, when the letter is not destroyed. And, if a particular description of it be essential to the validity of the indictment, a conviction under this or any other similar provisions of the act would be hopeless. The security of individuals does not seem to demand this particular description of the letter, and to require it would, in most instances, defeat the great purposes of justice."

It is further claimed by the plaintiff in error that the evidence shows that the route over which Farnum carried the mail is different than that described in the indictment. We do not think so. The indictment would be good if the description of the route had been entirely omitted. It has been held, that whatever is not necessary to constitute the

offense may be treated as surplusage. This is particularly the case when the offense is statutory, and in such a case it is always sufficient to charge the offense in the words of the statute, although more particularity is required in bringing the offense within it. Whenever, as in this case, more words are used than are necessary to make out the offense, I think the remaining may be rejected as surplusage. *Crichton* v. *The People*, 6 Parker's Crim. Rep. 370. If reference is had to the evidence of Taber, it will be seen that a description of the route, as laid in the indictment, was proven.

In the case of the *United States* v. *Paterson*, 6 McLean, 466, it was held that a general averment that the party was employed in the post-office establishment of the United States is sufficient.

Did the court err in overruling the motion for a new trial? Inasmuch as the defendant was acquitted on the second, fourth and fifth counts, it will not be necessary to advert to them in this opinion. In the first count it is charged that Henry P. Farnum, being a person then and there employed in a department of the post-office establishment as mail carrier, etc., did embezzle and destroy two packages of letters and two packages of gold dust and two sacks of gold dust, with which he was then and there intrusted, and which packages of letters and packages of gold dust had then and there come to his possession, and was then and there intended to be conveyed by post, etc. The third count charges that the defendant did feloniously take the mail of the United States of America, and two certain packages of letters, and two certain sacks of gold dust, and packets therefrom, and did open, embezzle and destroy such mail, packages, letters, sacks of gold dust and packets; the said two packages of letters and packet containing articles of value, and the said two sacks of gold dust being of the aggregate value of $1,200. In this count it is not alleged that he is an employee of the post-office establishment. The sixth count charges that the defendant, being employed in a department of the post-office establishment,

did embezzle and destroy a letter and two sacks of gold dust with which he was then and there intrusted, and which had then and there come into his possession, and were then and there intended to be conveyed by post, etc. The seventh count charges that the defendant, being a person employed in a department of the post-office establishment, did, with force and arms, secrete and embezzle two sacks of gold dust of the value, etc., with which he had been intrusted, and which was intended to be conveyed by post, etc. The evidence in the case was substantially as follows: Horace A. W. Tabor testifies that, on the 21st day of June, 1869, the day named in the indictment, he was postmaster at Oro city, Lake county, Colorado; that, on the morning of that day, he put the mail up and put in the mail sack two bags of gold dust; they were tied with a string, and to them a tab was attached, on which were the directions; an envelope was wrapped around them. When Farnum reached the post-office at Granite, and the mail sack was opened, a package of letters and the sacks of gold dust were missing. It further appears that there was a rent in the mail bag. Search was instituted for the missing letters and gold dust, and, at a point between Oro and Granite, and some distance from the trail usually pursued by Farnum in carrying the mail, a package of letters was found, which Tabor swears was mailed by him on the twenty-first.

The defendant was thereupon arrested, and a few days subsequently search was made for the missing gold dust on Farnum's premises, and discovered in a tin can under a corn chest in Farnum's stable. There was evidence also going to show that Farnum had previously stated, that, unless he was paid for the labor he had performed in transporting the mail, "a mail bag would turn up missing some day." It nowhere appears that the letters, which it is alleged Farnum secreted and embezzled, contained any article of value. To the introduction of evidence in reference to the bags of gold dust, the defendant below objected, on the ground that the same was not mailable

matter. This objection was overruled, and this ruling is assigned for error. The statute on which the first, sixth and seventh counts of this indictment are based will be found in the thirteenth volume of the United States Statutes at large, page 337, section 12, which reads as follows: "That if any person employed in any department of the post-office establishment shall unlawfully detain, delay or open any letter, packet, bag or mail of letters with which he shall be intrusted, or which shall have come to his possession, and which are intended to be conveyed by post; or if any such person shall secrete, embezzle or destroy any letter or packet intrusted to such person as aforesaid, and which shall not contain any security for, or assurance relating to, money as hereinafter described, every such offender, being thereof duly convicted, shall, for every such offense, be fined not less than $300, or imprisoned not less than six months, or both. And if any person employed as aforesaid shall secrete, embezzle or destroy any letter, packet, bag or mail of letters with which he shall be intrusted, or which shall come to his or her possession, and are intended to be conveyed by post, containing any bank note, * * * or any other article of value, such person shall, on conviction, be imprisoned not less than ten nor more than twenty-one years."

It will be observed that this section defines different offenses, and prescribes different punishment. The secretion, embezzling or destroying of a letter containing no article of value is defined to be one offense, and the punishment adjudged is fine not less than $300, and imprisonment not less than six months.

The secreting, embezzling or destroying a letter containing any article of value is another offense, and a different punishment is prescribed.

It must be further observed that this section applies to persons employed in the departments of the post-office and to none others.

In neither of the counts in the indictment, in which the defendant is designated as a person employed in the depart-

ments of the post-office, and on which he has been adjudged guilty, is it alleged that the letters secreted and embezzled contained any article of value, nor is it charged that the gold dust was contained in any letter or packet of letters, or bag or mail of letters. Before a jury can find a person guilty under the latter portion of this section, which adjudges a ten years' term of imprisonment, they must find that he secreted, embezzled or destroyed a letter or packet of letters, or bag or mail of letters containing some articles of value. It must be so charged in the indictment, and so established in the evidence. After a careful examination of this provision we have reached the conclusion that the secreting and embezzling of the gold dust by the defendant is not an offense against the law under consideration, for the reason that it nowhere appears that the gold dust was contained in a letter or packet of letters, and for the further reason that it is not charged in any of the counts of the indictment that the defendant secreted, embezzled or destroyed any bag or mail of letters containing the gold dust.

If the defendant is liable to conviction and punishment at all, it must be under that provision of the section which declares that, if any person employed in any of the departments of the post-office establishment shall secrete, embezzle or destroy any letter or packet intrusted to such person as aforesaid, and which shall not contain any article of value, such person shall, for every such offense, be fined not less than $300, or imprisoned not less than six months.

The cause seems to have been tried entirely upon the hypothesis that the defendant was answerable, as charged in the indictment, for the embezzling of the gold dust. On this theory the instructions were based and given, and on this theory the jury acted in making up their verdict, and the court in assessing the punishment.

The third count of the indictment, and on which he was adjudged guilty, charges him with secreting and embezzling a letter containing an article of value, but it does not charge that he was employed in any department of the post-office

establishment. This count is based on the eighty-first section of the act defining crimes. 1 Brightley's Digest, 217. The conviction on this count cannot be supported. There is not a shred of testimony tending to show that the letters secreted and embezzled contained any article of value. The seventh count cannot be sustained, for the reason that it refers exclusively to secreting and embezzling the gold dust, and does not allege that it was contained in any letter, packet of letters, bag or mail of letters.

We have, then, the first and sixth counts left, with the defendant charged in each with secreting and embezzling a packet of letters containing no article of value.

If the defendant, under the evidence, could have been convicted at all, it must have been under these counts and for the offense of secreting letters containing no article of value, and for this crime he could only be punished by the imposition of a fine not less than $300, or imprisonment not less than six months, or both. The judgment of the court, in sentencing him to ten years' imprisonment, is not warranted by the law. Inasmuch as this case has been tried under a misconception of the law, the judgment of the court below is reversed, and the same remanded for a new trial.

Reversed.

PAUL v. LUTTRELL.

REPLEVIN *will not lie for taking without detention.* Under the statute the action of replevin, whether in the *cepit* or *detinet* lies, as at common law, only for the recovery of goods *in specie*, and a mere unlawful taking not followed by detention will not suffice to maintain it.

PLEADING IN REPLEVIN — *detention of property may be put in issue.* The detention of the goods is a material fact, necessary in either form of action to maintain the plaintiff's case, and may always be put in issue, either by the plea of *non detinet*, or, perhaps by the plea of *non cepit*, where the plaintiff declares in the *cepit* or by special plea.

EVIDENCE OF DETENTION *in replevin — what shall be.* Upon such issue the plaintiff may maintain the affirmative, by proof of the taking, or by proof of demand and refusal before action brought, or by proof of other circum-

stances warranting the inference that a demand would have been unavailing. Upon such issue the defendant may maintain the negative by showing that, before suit brought, he restored the goods to the plaintiff's possession, or that the goods were, before action brought, destroyed by the act of God, or possibly by his own act.

PLEADING—*a fact in issue shall not be regarded as admitted by previous pleading.* Where any particular fact is affirmed on the one side and denied on the other, no previous admission in the pleadings can be taken as evidence of the existence or non-existence of that fact.

PLEADING IN REPLEVIN. *Non detinet is good.* Therefore if, to a declaration in the *cepit*, the defendant plead *non detinet*, this shall not be regarded as an admission of the taking alleged in the declaration in such sense as to relieve the plaintiff from making proof of the detention.

NEW TRIAL—*evidence insufficient in replevin.* In replevin in the *cepit* and issue joined upon plea of *non detinet*, if there is no proof of the taking or of demand and refusal, or of equivalent circumstances to show detention, the evidence is not sufficient to support a verdict for the plaintiff, and a new trial should be awarded.

Appeal from District Court, Jefferson County.

AT the trial the evidence was, in substance, as follows:

John D. Parmelee testified that the property in controversy was a small portable engine, with saw-mill attached, circular saw, lath saw and belting; in the fall of 1867 it was in possession of Hendry; in September it passed into the hands of plaintiff; in January, 1868, it was sold by the sheriff, and passed into defendant's hands; plaintiff bought the saw which was there in January, 1868; there was a saw carriage, made partly by Hendry and completed by plaintiff; plaintiff set up the mill the second time; it was done in January, 1868; there was some belting bought by plaintiff, also a new truck; I hired the property from plaintiff in December, 1867, for six months; was to pay $150 per month.

James S. Danford testified that the mill was in plaintiff's possession in September, 1867; that the property was worth $1,000 in January, 1868.

The plaintiff introduced a letter from Paul, the defendant below, to the witness Parmelee, in which the latter was notified by Paul that he had purchased the property at the sheriff's sale; that the property had been sold under an

execution, issued out of the probate court of Park county, in favor of Alex. Ray & Co. and against the Union Mill Company, and that he should not pay rent for the mill.

The defendant offered a certified copy of an alias execution, issued out of the probate court of Park county, with the officer's return thereon, against the property of the Union Mill Company and in favor of Alexander Ray and William Shellinger, also a transcript of the judgment in the same cause, which is authenticated by the clerk's certificate in the following form: "I certify that the preceding is a true copy of the docket of an original record of judgment remaining on the files of this office."

The defendant also offered the original execution and the officer's return thereon in the same cause; the defendant also offered an appeal bond in the same cause, all of which were, upon plaintiff's objection, excluded by the court. The defendant also offered to prove, by the sheriff of Jefferson county, that he sold the property under the execution before offered in evidence, but the court refused to receive the testimony.

Mr. J. MARSHALL PAUL, *pro se.*

Mr. S. E. BROWN, for appellee.

WELLS, J. The defendant in error brought replevin against plaintiff in error, and declared in the *cepit;* defendant in the court below pleaded *non detinet* and property in himself; issue was joined upon these pleas, and the cause was submitted to a jury, who found for the plaintiff below upon both issues. Upon the trial, the evidence offered by the defendant in support of his plea of property was excluded, and we think properly; there was also evidence of a possession by the plaintiff of the goods in controversy at some time prior to the bringing of his action; the finding of the jury upon the second issue is therefore supported by the evidence.

But we think there is no evidence to support the finding upon the plea of *non detinet.*

All of the evidence which can, in any way, be applied to this issue is entirely consistent with the supposition, that the defendant derived possession of the goods in controversy (if indeed he ever had possession of them) by a delivery; there was no evidence given of a taking by the defendant, or of a demand and refusal to surrender them, or of equivalent circumstances.

The question is, therefore, presented, whether in this form of action the plea of *non detinet* presents a material issue.

In this territory replevin lies "whenever any goods or chattels have been wrongfully distrained or otherwise wrongfully taken, or shall be wrongfully detained." According therefore as the plaintiff declares in the *cepit* or in the *detinet*, either the taking or the detention is the gist of the action; but we think that the plaintiff must establish a detention in either case, if put in issue, for the words of the statute above quoted are manifestly qualified by other words which follow in the same section, whereby it is provided that, in the cases before therein specified, "an action of replevin may be brought for the recovery of such goods and chattels." That is to say, the action of replevin in either form lies, as at common law, only for the recovery of goods *in specie;* and a mere unlawful taking, not followed by a detention, will not suffice to maintain it. It follows, therefore, that the detention of the goods is a material fact necessary in either form of the action to maintain the plaintiff's case, and may always be put in issue, either by the plea of *non detinet*, or perhaps by the plea of *non cepit*, where the plaintiff declares in the *cepit*, per ROGERS, J., in *MacKinley* v. *McGregor*, 3 Whart. 398, or we think by special plea, and when so put in issue the plaintiff may maintain the affirmative by a mere proof of the taking, from which the law presumes that the goods continue in the defendant's possession, and that the defendant remains of the purpose in which he committed the wrong, and intends to retain them, or by proof of demand and refusal before action brought, or by proof of other circumstances

warranting the inference that a demand would have been unavailing. *Johnson* v. *Howe*, 2 Gilm. 342.

The defendant, on the other hand, may maintain the negative of the issue by showing, if he can, that, before suit brought, he restored the goods to the plaintiff's possession, or that the goods were before action brought destroyed by the act of God, or possibly by his own act, for it cannot well be said that one unlawfully detains that which is not in being.

It is argued, however, that, by his failure to traverse the taking, the defendant has admitted the allegations of the declaration in this regard, and that from this admission a detention may as properly be inferred as if the taking had been affirmatively proven upon the trial.

But we cannot subscribe to this conclusion. It is every day practice that a defendant pleads two pleas, one admitting material facts denied by the other: *e. g.*, in assumpsit, the general issue and payment, or accord and satisfaction; in trespass, not guilty and a justification, and the like in other cases; yet it never was thought that, in such case, the latter plea might be read to the jury to establish the affirmative of the issue under the former, or could operate against the defendant in any way. If this were so, manifestly the affirmative would in such cases rest wholly with the defendant, and he, it might well be said, would be entitled to begin and conclude to the jury, which was never seen.

The approved doctrine is, that, "where any particular fact is affirmed on the one side and denied on the other, no previous admission in the pleadings can be taken as evidence of the existence or non-existence of that fact." 1 Phill. Ev. (5th Am. ed.) 796;* ALDERSON, B., in *Edmunds* v. *Gores*, 2 Mees. & Wels. 642; CRESSWELL, J., in *Fearn* v. *Filica*, 7 M. & G. 513; *Kirk* v. *Newell*, 1 Term R. 125; *Harrington* v. *McNaughton*, 5 Taunt. 232; *Whittaker* v. *Freeman*, 1 Dev. 271.

We are of opinion, therefore, that the admission of the taking cannot be received to supplement the defect in the plaintiff's proofs upon the issue under the first plea,

and because there is no evidence to support the finding upon this issue the judgment of the district court must be reversed with costs in this court and this cause remanded, with directions to that court to award a new trial.

Reversed.

ROACH v. BINDER.

REPLEVIN *in detinet — demand and refusal.* In replevin against one who has acquired the property replevied in good faith, it is necessary to prove a demand before suit brought or something equivalent to it.

EVIDENCE — *acts and declarations of plaintiff not admissible in his favor.* An instruction to the jury that a demand may be inferred from the actions, conduct and conversation of the parties is erroneous.

Appeal from District Court, Arapahoe County.

Mr. ALFRED SAYRE, for appellant.

Messrs. MILLER & MARKHAM, for appellee.

HALLETT, C. J. Replevin before a justice of the peace, to recover a cow and calf, thence removed to the district court by appeal. The calf was not found, and appellee took judgment for the cow. It seems that the animal strayed from appellee's herd, and subsequently appellant purchased her from one Rooney who had possession of her, and who in turn had purchased her from some other person. As appellant acquired the animal in good faith by purchase from one in possession, we do not understand that he can be made liable in replevin, unless upon demand before suit or something equivalent to it. *Ingalls* v. *Bulkly*, 13 Ill. 315; *Clark* v. *Lewis*, 35 id. 423, is not opposed to this view. In that case the purchase was made at a sale under a town ordinance, and the purchaser was affected with notice of the illegality of the proceeding.

The district court instructed the jury that a demand was necessary, and added: "The jury may infer a demand of

the property from the actions, conduct and conversation of the parties."

In so far as this comprehends the actions, conduct and conversation of the appellee, who was plaintiff below, which did not occur in the presence of appellant, it is of course erroneous. We regret that the evidence of demand and refusal is not clear enough to authorize us to overlook this error, but, as the jury may have been misled by the instruction, the judgment of the district court must be reversed with costs, and the cause remanded.

Reversed.

DEITZ *v.* CITY OF CENTRAL.

1	323
5	422
7	590
10	395
11	546
1	323
d13a	79
1	323
16a	47
1	323
30	400
1	323
17a	310
17a	311
1	323
34	399
20a	107

LEGISLATIVE POWER — *to create a city.* Under the organic act the legislative assembly has power to establish a municipal corporation.

LEGISLATIVE POWER — *to change the official title of a justice of the peace.* The legislative assembly has no power to confer upon a justice of the peace a denomination not warranted by the organic act, and, in so far as the charter of the City of Central confers upon the justice of the peace exercising jurisdiction under the ordinances thereof, the name of police magistrate, it is void.

JURISDICTION *of justice of the peace under ordinances of city.* But, notwithstanding the attempt of the legislative assembly to confer a wrong name upon him, the justice of the peace has jurisdiction of cases arising under the ordinances of the city.

ORDINANCES *of city — when reasonable.* Where authority was conferred upon a corporation to suppress and prohibit the sale of intoxicating drinks, as well as to license the same, an ordinance which imposes a penalty for selling such drinks without license, which penalty exceeds that fixed by the general law of the territory, is reasonable.

INTEREST OF MAGISTRATE *in result of suit — what will disqualify.* Where a citizen of a municipality is elected a justice of the peace, according to the charter, that he is, in virtue of his citizenship, entitled to share in the penalties adjudged against the accused, is no objection to his competency. In such case the provisions of the charter amount to an express declaration that interest shall not disqualify.

WAIVER OF OBJECTIONS — *on appeal from justice of the peace.* Section 46, chapter 50 of the Revised Statutes, 407, relating to proceedings in district court on appeal from justice of the peace, is applicable to cases arising under the ordinances of the city of Central.

Objection that summons was returnable on the day it was issued, cannot be made in district court.

Nor that the justice of the peace assumed a title not warranted by law.

Nor that the plaintiff's demand was not indorsed on the summons.

PRACTICE *in actions to recover penalty under city ordinances.* Where the charter of a city provides that to recover a penalty, fine or forfeiture, prescribed by ordinance, it shall be sufficient to declare generally, in debt, it is not necessary to file a written declaration in the common-law form.

PRACTICE — *when to make objections.* Objections to the competency of witnesses must be made at the trial.

PLEADING AND PROOF — *as to time.* In an action to recover a penalty for selling intoxicating liquor without license, evidence may be introduced of sales made anterior to the earliest day named in the complaint.

EVIDENCE *of refusal of city officers to issue license.* In such action the defendant cannot show that the city clerk improperly refused to issue a license to him.

VERDICT — *in an action of debt to recover a penalty.* In such action a verdict of guilty is substantially responsive to the issue.

JUDGMENT — *when defendant may be imprisoned.* Where the charter provides that if the defendant has no property whereof the judgment can be collected, the defendant may be committed to jail, it is error to enter judgment that the defendant stand committed until the fine and costs are paid. In such case execution should be awarded, and if no property can be found the defendant may be committed to jail.

Appeal from District Court, Gilpin County.

ACTION of debt upon an ordinance of the city of Central, which provides that if any person shall sell or give away any intoxicating or fermented liquors without license, in quantities less than one quart, without first obtaining a license therefor, he shall for each offense forfeit and pay to the city a sum of not less than $25, nor more than $50.

This ordinance is based upon section 20 of the charter of the city (3 Sess. 245), which is as follows: "To license, restrain, regulate, prohibit, and suppress tippling houses, gambling houses, bawdy houses, and other disorderly houses, and the selling and giving away of any intoxicating or malt liquors by any person within the city, except by persons duly licensed."

A general law of the territory authorized the county commissioners in each county to license the sale of intoxi-

cating liquors, and imposed a penalty of $20 for the violation of its provisions.

Mr. Justice BELFORD dissented from so much of this opinion as affirms the lawful existence and powers of the person styling himself police judge, before whom these proceedings were instituted.

Mr. I. N. WILCOXEN and Mr. S. B. HAHN, for appellant.

Mr. L. C. ROCKWELL, for appellee.

WELLS, J. The errors assigned in this case question, first, the existence of the corporation which was plaintiff below; second, the reasonableness and validity of the ordinance under which the conviction was had; third, the existence and powers of the functionary before whom the process was instituted; fourth, the regularity of the proceedings.

We have examined the multitude of questions urged in this case, with the careful consideration to which the elaborate diligence of counsel entitles them.

As to the first question: It is solemnly argued that the legislature of this territory have no authority to create municipal corporations, for that congress, not having such power, could not confer it upon the legislature of the territory, which is its mere creature.

But upon what ground of reason can it be said that congress has not such authority?

Whether it be referred to an express constitutional grant or to necessity arising out of its sovereignty and proprietorship, we think it can scarcely, at this day, be doubted that the authority of congress to govern the territories is absolute and supreme.

It may be that the inhibition against laws prohibiting the free exercise of religion, or abridging the freedom of the press, against the taking of private property without compensation, and the other express restraints imposed by the constitution, extend as has been contended, *proprio vigore*, to the territories, but beyond these, the power of congress

to govern in the territories by such means and agencies as in its wisdom it may select, is indisputable.

They might themselves enact laws operating directly in the territory, or appoint a governor and judges invested with legislative powers, both of which were done in the north-west territory.

Or they might enact, that all authority, whatever, should be invested in such person or persons as the president might appoint; this was done in the case of Florida.

Or they might provide for a legislature to be appointed by the president, as was done, in the first instance, for the Territory of Louisiana.

Or they might, we conceive, organize each community in any or all of the territories into a municipality, with power of local self-government.

The whole of this authority, so far as concerns the local affairs of the citizens, and within the restrictions contained in the organic act, congress has conferred upon the legislative assembly of this territory, subject at all times to a revocation of the grant in its own pleasure, and subject, in its exercise, to a conformity with the constitution and the acts of congress, including the organic act.

Within these restrictions and limitations, and subject to the power of revocation in congress, the legislature of this territory may do whatever congress might do, if assuming to govern by its own enactments.

It is said, that, admitting the power of congress, the legislative authority of the territory rests upon other grounds; and being a mere delegated authority cannot, itself, be the subject of a delegation.

But the authority of every State legislature is also a derivative and delegated authority, and the maxim here relied upon has always, in a proper case, been held to avoid their enactments when in conflict with its principle; nevertheless it may safely be assumed, that in no State of the Union was there ever an express constitutional provision authorizing the erection of municipal corporations, nor probably is there any State in which the legislative au-

thority has not, from the earliest periods, assumed and exercised the power now brought in question. In no case to which we have been referred have the courts denied its existence; and, on the contrary, in numerous cases and by the most respectable courts, it has been expressly affirmed.

And, if we shall now declare, that in this territory the power does not exist, it will be to destroy and prohibit within our borders all these local municipalities and miniature republics, which are the very womb and nursery of our free institutions.

The reasonableness of the ordinance under which appellant was prosecuted is denied, upon the ground that it imposes a penalty greater than that provided by the law of the territory.

But when we consider, that, by the express words of the statute, this corporation is authorized not only to license, but to suppress and prohibit the sale of intoxicating liquors, which the legislature has not attempted to do, how can it reasonably be said, that the general law is, in any respect, the measure of the powers of the corporation? In no one of the cases relied upon by counsel has this been decided.

In *Austin* v. *Murray*, 16 Pick, 121, the by-law was held void because not warranted by the charter, while the amount of the penalty did not come in question.

In *Mayor of New York* v. *Nichols*, 4 Hill, 209, the ordinance in question prohibited any sale of hay without having the same inspected and weighed; the court held it to be void as against the provisions of the general statute, which expressly provided that hay pressed and put up in a particular manner might be sold "by any standard weight which shall be agreed upon between the buyer and seller."

In *The City of Boston* v. *Shaw*, 1 Metc. 130, the only question was, whether the method prescribed by the ordinance for the apportionment of the expenses of sewerage among property owners was or was not a reasonable one.

In *Dunham* v. *Robertson*, 5 Cow. 462, the charter authorized the village to make such prudential by-laws as they may from time to time deem meet * * * relative to taverns,

gin shops and hucksters' shops in said village * * * provided, always, that such by-laws be not contrary to, or inconsistent with, the law of this State. The by-law provided that hucksters should be licensed, and that every person keeping a huckster's shop without license should pay a penalty named. The court held the ordinance void, as in restraint of a trade upon which no restriction was apparently necessary.

By-laws, the court say, must accord with the laws of the State and the general principles of law; and by this we understand that the by-law must not countervail any express provision of the statute or the recognized principles of common law; not that necessarily the corporation may not go further in legislating for their own members than the legislation of the State upon like subjects.

If we admit the rule contended for, we practically nullify a very large part of the provisions of this charter. Here is an express authority given to suppress tippling houses and to do many other things that no law of the territory has yet assumed to do, and if the penalty recovered in this case was unauthorized, then, for the same reason, every attempt of the corporation to exercise the numerous special powers contained in the charter relating to subjects, upon which the legislature has not prescribed a rule, must be forever ineffectual.

The cases of *City of Pekin* v. *Smelzel*, 21 Ill. 465; *City of Burlington* v. *Keller*, 17 Iowa, 369; S. C., 18 id., are directly in point, and, we think, directly against the position assumed by counsel for the appellant.

As to whether there is such an officer as the one before whom this prosecution was instituted, it will be observed that the officer subscribes himself in the process police magistrate. It is said that by the organic act of the territory no such officer is recognized, but that all judicial power is vested in the supreme court, district courts, probate courts and justices of the peace.

By the charter of this corporation it is provided that at the first election there shall be elected, among other officers,

"one justice of the peace, to be denominated police judge for the city of Central, * * * and on the first Monday of April, in every second year, one police judge," and in another section, that "the police judge shall have jurisdiction in all cases of violation of the city ordinances, and shall have the same jurisdiction in all civil and criminal proceedings as is now, or hereafter shall be, conferred upon other justices of the peace of this territory, and in all courts of this territory, said police magistrate shall be held to be a justice of the peace."

In other portions of the charter, as well as in the section just quoted, the officer is termed, as will be observed, indiscriminately, a police judge and police magistrate.

The majority of the court think that so much of the charter as confers or authorizes the power to assume a denomination not warranted by the organic act may well be held void; but, in determining whether the office exists or not, we are inclined to the opinion, that we ought to look rather to the substance of the powers conferred upon the incumbment, than to the name by which he is designated; guided by this principle, we have no difficulty in concluding that the officer designated by the charter police justice or police magistrate lawfully possessed the powers which he assumed in this proceeding.

Whether in the exercise of this power he is not required to act as, and assume to be, a justice of the peace, and to disregard the unwarranted title with which the legislature have invested him, is a question which, in the view we take of this case, it is not necessary for us to determine.

It is said, that the police judge, being entitled to participate in the penalties adjudged against the defendant, was interested in the event of the prosecution, and was therefore incompetent to give judgment, or issue process, or entertain the proceeding in any stage. The argument assumes (what is not shown in the record) that the magistrate was a citizen of this municipality, and this we think it is fair to assume, and perhaps the necessary conclusion from the fact of his incumbency in the office: for the charter clearly contem-

plates that all officials therein provided for should be elected by the qualified voters of the city from among their own number; but if we are correct in this, then the provisions which confer jurisdiction upon the police judge, in causes arising under the charter and ordinances, is equivalent to an express declaration that his interest in the penalties shall not disqualify.

The objections as to the existence and competency of the officer are thereupon overruled.

As to the manner of the proceedings it is objected that the summons was made returnable on the day of its issuance. If in this proceeding the justice was bound to observe the rule prescribed by the general law, upon which we express no opinion, the judgment might for this reason have been set aside upon certiorari brought, or the defendant might have disregarded the judgment and brought his action against the justice if he issued execution thereon.

But, by appealing from the judgment of the justice, he has, we think, waived all irregularities in the process by which he was brought into that court.

The statute declares that no exception shall be taken to the form or service of the summons issued by the justice of the peace, nor to any of the proceedings before him, but the court shall hear and determine the cause in a summary way, without pleadings in writing, and nothing can be clearer, we think, than that the intention of the legislature was to require a trial upon the merits, without objections to any of the proceedings before the justice.

We do not feel called upon to reconcile with this statute what is said by the supreme court of Illinois. *County Commissioners, etc.* v. *Robertson*, 5 Gilm. 563; *Adams* v. *Miller*, 12 Ill. 27; *Walsen* v. *Nettleton*, 13 id. 62.

It is sufficient to say that the construction we have given the statute appears to us the true one, and we are supported by the later cases of *Swingley* v. *Haynes*, 22 Ill. 216, and *Ohio and Mississippi Railroad Company* v. *McCutchin*, 27 id. 9.

It is urged that the provisions of the justices' act were

intended to apply only to civil causes, and that this prosecution is a criminal one; and the case of *Edwards* v. *Vandermarck*, 13 Ill. 633, is referred to; but we are not prepared to admit that this is not a civil case in such sort that an appeal might not lie even though not allowed by the charter; and by that section of the charter which allows the appeal, it is expressly declared that appeals "shall be granted in the same manner and with like effect as appeals are taken from and granted by justices of the peace, under the laws of this territory."

This disposes of the objection, that the process was signed with a title which the officer had no right to assume, and that no demand was indorsed thereon; as to this latter the statute has been held to be directory merely, and a failure to comply with it immaterial. *Eaton* v. *Graham*, 11 Ill. 620.

As to the complaint, the charter provides that "it shall be lawful to declare generally in debt for such penalty, fine or forfeiture, stating the clause of this act, or the by-laws or ordinance, etc., and to give the special matter in evidence."

It is argued that under this provision the city attorney should be required to file a declaration, as in the common-law action of debt; but we think the statement, account or complaint which was filed in this cause, indefinite and informal as it is, must be regarded as a compliance with the intention of the legislature. We cannot believe that the legislature intended to introduce into a court not of record, and in this class of proceedings, which, in many instances, must be summary in their nature or else altogether ineffectual, the subtleties of the common-law action of debt, with the delays incident to it. Having reference to the subject-matter to which this legislation is applied, we think the language may well receive a construction less restricted than in another case we might be compelled to adopt.

As for the objection, that inhabitants of the city were permitted to testify on behalf of the prosecution, it is a

sufficient answer to say that no objection to their competency was made upon the trial.

It is further urged that the prosecution upon the trial were permitted to put in evidence of sales by the plaintiff, anterior to the earliest day named in the complaint. The cases from Massachusetts, which were cited in support of this objection, are not in accord with the authorities elsewhere, and we are not satisfied with the reasons upon which that court proceeds.

As for the objection that the absence of the license to the plaintiff was not established, we think that if the burden of proof, as to this, rested in the first instance upon the prosecution, upon which we express no opinion, sufficient was shown to devolve upon the defendant the duty of establishing the fact of his license, if he had one. It was proved that by the ordinance of the city, the city clerk was required to keep a register of all licenses issued by him; that register was produced, and the clerk testified, as we understand him, though his testimony was conflicting, that no license had in fact been issued to the defendant for the period in which the alleged unlawful sales were made. The jury were the proper judges of the effect to be given to the whole testimony, and they have found that the defendant had no license.

On the trial the defendant offered to show that, before the sales charged, he had applied to the mayor for license to sell intoxicating liquors, and that his application was approved; that thereupon he had made application to the clerk of the city to issue the license, and made tender in gold coin of the proper license fee, but that the clerk refused him such license.

This evidence, it is assigned for error, the court below excluded.

We think the ruling of the district court was correct.

If the clerk refused to issue the license where the defendant was entitled to it, the remedy was by mandamus to compel the clerk to perform his duty, or by action on the case for the wrongful refusal.

It cannot be said that this was the act or default of the corporation, for the clerk, if the agent of the corporation in any sense, was so only within the limit of his duty. If he refused to issue the license, where he was bound by law to issue, it was of his own wrong, and the defendant must seek his remedy against him alone.

The verdict seems to us to be substantially responsive to the issue. Although the proceeding is in form of an action of debt, the real question in issue was, whether the defendant had been guilty of a violation of the ordinance, and this issue is certainly settled by the verdict of guilty. The only other finding which, upon any principle, could have been made, is the common-law verdict, in the action of debt, that "the defendant doth owe the said plaintiff the said sum of, etc., above demanded," but it cannot be said that there is any specific debt or sum certain sought or demanded in such prosecution as this: the fine to be imposed, which is the only thing recovered, might be greater or less within certain limits, and in the absence of any regulation by ordinance, it appears to us that the jury could have nothing to do with fixing the amount of this fine.

No such regulation is shown by the record, and we express no opinion as to its effect if it were shown.

The proceedings were, therefore, we think, sufficiently regular in these respects.

But in the entry of the judgment the court clearly erred. The charter warrants a commitment of the accused in prosecutions of this sort only when he has no real or personal estate which can be taken to satisfy the judgment, and the district court in this case ordered that the defendant stand committed until the payment of the fine and costs, without reference to whether he had property liable to execution or not.

For this error the judgment will be reversed, and the cause remanded, with instructions to the district court to enter judgment upon the verdict, and to award execution thereon to the sheriff of Gilpin county, and to further order that in case estate of the defendant sufficient to satisfy the

judgment and costs be not found, execution issue against the body of the defendant, and that thereon the defendant be committed to the common jail of Gilpin county, there to be confined, until at the rate of one day's confinement, for each dollar of the said fine and costs, the judgment be fully satisfied, such imprisonment not to exceed, however, the term of six months.

The judgment is reversed, with costs, in this court.

Reversed.

MILLS et ux. v. ANGELA.

MARRIED WOMAN — *may defend actions.* A married woman is under no disability in respect to the time or manner of making her defense to an action brought against her.

PRACTICE — *defense must be interposed at earliest opportunity.* An objection which was not made in the court below will not be considered in this court.

DEMURRER TO BILL IN CHANCERY — *does not reach defects not apparent in the bill.* In a bill against husband and wife to foreclose a mortgage, it was averred that the defendants made, executed, acknowledged and delivered the mortgage to complainant. No copy of the mortgage was attached to the bill. Objections to the sufficiency of the certificate of acknowledgment appended to the mortgage were not raised by demurrrer to the bill.

PRACTICE — *bill to foreclose need not be put in under oath.* A bill to foreclose a mortgage need not be put in under oath. The signature of counsel is a sufficient authentication.

Appeal from District Court, Clear Creek County.

Mr. Justice WELLS, having been of counsel, did not participate in the decision of this cause.

Mr. R. S. MORRISON and Mr. HUGH BUTLER, for appellants.

Mr. H. R. HUNT, for appellee.

HALLETT, C. J. This was a bill to foreclose a mortgage to which appellants demurred, and the demurrer was overruled. No other defense being made, the bill was taken

pro confesso. The argument at the bar was mainly directed to the certificate of acknowledgment attached to the mortgage, which is said to be insufficient as to Emiline, one of the appellants. If, however, it shall appear that this question was not presented in the court below, upon what ground may appellants base their claim to be heard in this court?

Generally a party must seek the earliest opportunity to make his defense, and if he does not do so, the law will presume that he has none. This salutary rule ought not to be disregarded unless the case is exceptional, and we do not see that the coverture of Mrs. Mills makes this one so. A married woman is under no disability in respect to the time or manner of putting in her defense to an action brought against her. In the absence of statutory regulation, the husband must be joined with her as a defendant, but this was doubtless for his protection as well as hers, and did not interfere with her defense. 1 Daniell's Ch. Pr. 140.

But our statute admits a married woman to the courts upon the same terms as if she were sole, and for this reason, if for no other, she cannot claim indulgence on the ground of coverture. She is not like an infant, who is incapable of acting for himself, and is compelled to rely upon a guardian *ad litem*, who may be careless or unfaithful. The law clothes her with power to manage her own affairs, and she ought to accept the responsibility which attends upon free agency. If the sufficiency of the certificate of acknowledgment was denied in the court below, it must have been by the demurrer, for appellants made no other appearance in that court. The certificate is not in terms referred to in the demurrer, and the defect of which complaint is made does not appear in the bill. It is alleged that "appellants made, executed, acknowledged and delivered to the complainant their mortgage deed of conveyance," and although it is stated that a copy of the mortgage is attached to the bill, no such copy appears in the record. Granting that every matter appearing in the bill was questioned *ore tenus* upon the argu-

ment of the demurrer the certificate of acknowledgment was not reached. That the allegation in the bill of the execution of the instrument was sufficient upon demurrer, see *Moore et ux.* v. *Titman*, 33 Ill. 364. In this case, a copy of the mortgage was attached to the bill, and the court examined the certificate of acknowledgment, but they, at the same time, declare that the sufficiency of the acknowledgment could not be questioned after default in answering. In the case at bar there was no exhibit attached to the bill, and therefore no question as to the propriety of examining a copy of a mortgage accompanying a bill upon demurrer to the bill, or otherwise, for the purpose of ascertaining whether the proof supports the allegation. In demurring to the bill, appellants admitted the averment of the acknowledgment of the mortgage to be true, and they did not afterward deny that averment. The master's report, which contained the mortgage, passed unchallenged, and appellants have come here in search of relief, for which they should have asked in the court below. *Reigard* v. *McNeil*, 38 Ill. 401.

These remarks apply also to the objection respecting appellee's name, concerning which, as well as the certificate of acknowledgment, appellants were wholly indifferent in the district court.

As to the fourth assignment of error, we are not acquainted with any rule which requires a bill for foreclosure to be put in under oath, or signed by the complainant. The signature of counsel appears to furnish sufficient authentication. Story's Eq. Pl., § 47.

The decree of the district court is affirmed, with costs.

Affirmed.

1	336
1	372
3	234
10	69
10	189
1	336
19	594

CITY OF DENVER *v.* KENT et al.

TRUST — TOWN SITE — *under legislative control.* Under the act of congress of May 23, 1844 (5 Stat. at Large, 657), and the amendatory act of May 23, 1864 (13 Stat. at Large, 94), the execution of the trust is under the sole and exclusive direction of the legislative assembly.

TRUST — TOWN SITE — *who are beneficiaries.* Portions of the town site of Denver, not subject to individual claim, are held by the trustee for the use and benefit of the community at large.*

TRUST — *unauthorized sale by trustee.* A sale by the trustee of any portion of the town site of Denver, not according to the rules and regulations prescribed by the legislative assembly, is wholly unwarranted and absolutely void.

TRUST — *duty of trustee.* In the absence of authority to sell any portion of the town site of Denver, it was the duty of the trustee to await the action of the legislative assembly.

STATUTE — *repugnant to acts of congress.* Section 6 of the act of the assembly of 1866 (5 Sess. 88), by which unclaimed lots were granted to the city of Denver for the use of common schools, is repugnant to the acts of congress relating thereto and therefore void.

TRUST — *abuse by trustee — who may bring suit.* The city of Denver, in its corporate capacity, may institute and maintain suits to set aside sales of unclaimed lots made by the trustee of the town site of Denver, without authority of law, and may keep watch over the property until the legislature shall authorize the sale thereof.

TRUST — *town site — disposition of estate.* The legislative assembly has power to direct the sale of unclaimed lots in the city of Denver, and may apply the proceeds of such sales to the erection of public buildings for the use of the city, or for the support of its public schools, or any other general purpose that will conduce to the interests of the community.

BILL IN CHANCERY — *multifarious.* Several plaintiffs cannot demand by one bill several matters perfectly distinct and unconnected against one defendant, nor can one plaintiff demand several matters of different nature against several defendants.

A bill to set aside and cancel several conveyances alleged to have been fraudulently made to different parties at several times by the trustee of the town site of Denver, is multifarious and cannot be maintained.

Appeal from District Court, Arapahoe County.

THE bill was filed by the city of Denver, as trustee for the use of common schools, against Omer O. Kent, probate judge, and a large number of persons, who, it was alleged, had obtained title to lots in the city of Denver. The several acts of congress and of the legislative assembly, relating to the matter of town sites, were referred to in the bill. It was alleged that James Hall was probate judge of the county of Arapahoe when the act of congress of 1864 was passed, and that he entered the lands mentioned in that act with the

*Appeal of D. R. Cash et al., 6 Michigan R. 193.

funds of the city and obtained title to the same; that the trust was not fully executed by him; that he was succeeded by Omer O. Kent, who proceeded in the execution of the trust until his term of office expired in September, 1867; that Jacob Downing then succeeded to the office and remained in office until the bill was filed in September, 1868; that about seven hundred and thirty-five lots have been wrongfully conveyed to persons having no right to the same; that these lots belonged to the city as trustee for common schools; that the probate court combined and confederated with the persons to whom such lots had been conveyed, to defraud the city and the common school fund of the proceeds of such lots; that many persons named as grantees in the conveyances made by the probate judge have no existence, and that such conveyances were made with intent to defraud the city and the common school fund.

Numerous conveyances alleged to have been fraudulently made were described in the bill. It was also alleged that a large number of lots, within the tract of land mentioned in the act of congress, had not been conveyed, and that the city of Denver was entitled to the same for the use and benefit of common schools; the prayer of the bill was that the several conveyances, made by the probate judge in fraud of the several acts of congress and of the legislative assembly, be declared void, and that the title of the city of Denver be perfected; that the probate judge be directed to convey to the city all lots so wrongfully disposed of, and all lots to which the city was entitled under the said acts, etc.

The bill was taken as confessed by some of the defendants and other defendants demurred. The district court sustained the demurrers and dismissed the bill.

Mr. ALFRED SAYRE, for appellant.

Messrs. CHARLES & ELBERT, for appellees.

Mr. Justice WELLS dissented.

BELFORD, J. The bill in this case was filed by the city of Denver, as trustee for the use of the common schools,

etc., against Omer O. Kent and others, to set aside and cancel a large number of deeds made by different probate judges to various persons. Separate demurrers were filed, assigning as grounds of demurrer:

First, that the complainant had no right to maintain the suit; and secondly, that the bill was multifarious. The demurrers were sustained, and this action of the court constitutes the error complained of.

The bill alleges that in 1865, James Hall, being probate judge of Arapahoe county, under and by virtue of an act of congress passed the previous year, entered a large tract of land that had been occupied as a town site by the citizens of Denver, and that he held that land in trust for such purposes. It is further alleged that he and his successors in office greatly abused their trust by making deeds of conveyance to numerous parties who were not entitled to receive them, and that, by reason of these fraudulent deeds, the community has been greatly injured. It further appears, that on the 9th day of February, 1866, the territorial legislature passed an act having direct reference to the disposition of certain portions of this land, and in which act it is provided that all lots and parts of lots in the city of Denver then held by Hall in trust by virtue of said act of congress, and to which there was no claimant, and to which no valid claim could be shown, should vest in the city of Denver for the use of the common schools of said city; and that the city of Denver should have the power, by suit, in any court having competent jurisdiction, to secure and perfect the legal title to the same.

The bill prays that these fraudulent conveyances be set aside, and that the title of the city to the lots in controversy be established and quieted. On behalf of the appellees it is insisted that the city of Denver has no title; that the act of the legislature was *ultra vires* and void, and that the claims of those now exercising ownership over these lots cannot be called in question. A correct decision of this case involves a review of the legislation of congress so far as the same is applicable to the entry of lands for town sites.

At an early period in our national history, it became the fixed policy of the government to aid in the settlement of the public domain. To this end, at various times laws were passed by which settlers upon such lands might, upon showing a compliance with certain prescribed rules, and for a small consideration, acquire the legal title to one hundred and sixty acres. These laws and rules, however, were only for the benefit of such persons as settled upon the public domain for agricultural purposes. In process of time settlements of widely different character were made. In eligible places large numbers of persons congregated, and towns and cities were built up. This kind of settlement was outside of the contemplation of the pre-emption laws, as they then existed, and it soon became a serious question how the title to this land so occupied should be secured. To meet this question congress passed the act of May 23, 1844, which provides:

That whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful, in case such town or place shall be incorporated, for the corporate authorities thereof, and if not incorporated, the judges of the county court of the county in which such town may be situated, to enter at the proper land office, and at the minimum price, the lands so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests. * * * The execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be provided by the legislative authority of the State or territory in which the same is situated: Provided, that the entry of the land intended by this act be made prior to the commencement of the public sale of the body of land in which it is included, and that the entry shall include only such land as is already occupied by the town, and be made in conformity to the legal

subdivision of the public lands authorized by the acts of the 24th of April, 1820. * * *

And provided further, that any act of said trustees, not made in conformity to the rules and regulations herein alluded to, shall be void and of no effect." Under the terms and provisions of this law, the lands embraced in many town sites that had been theretofore settled, and of many towns subsequently settled and occupied, were conveyed to the proper and rightful occupants thereof. In the year 1859, a large number of persons associated together, under the name of the Denver Town Company, and took possession of a portion of the public domain now known as the city of Denver, which they surveyed and laid off into streets, alleys, blocks and lots, and which they commenced to improve as a town, by the erection of dwelling-houses, stores and offices. When the lands on which this city was built became surveyed, and the lots and buildings acquired value, the owners became anxious for a title. The laws of 1844 limited the entry for town purposes to three hundred and twenty acres, and the city of Denver covered more than a thousand; so that there was no law by which a proper title to this land could be made to the men who were the occupants of the same, and the owners of the improvements thereon. To remedy this difficulty congress was applied to, and in response to this application passed the act May 28, 1864, which provides:

"That the provisions of an act of congress entitled 'an act for the relief of the citizens of towns upon the land of the United States, under certain circumstances, approved May 23, 1844,' be so extended as to authorize the probate judge of Arapahoe county, in the territory of Colorado, to enter at the minimum price in trust for the several use and benefit of the rightful occupants of said land and the *bona fide* owners of the improvements thereon, according to their respective interests, the following subdivisions of land, or such portions thereof as are settled and actually occupied for town purposes by the town of Denver aforesaid, to wit: Section number 33, and the west half of section number 34,

in township number 3 south of range number 68, west of the sixth principal meridian. That in all respects, except as herein modified, the execution of the foregoing provisions shall be controlled by the provisions of said act of the 23d of May, 1844, and the rules and regulations of the commissioner of the general land office." From an examination of these two acts it will be observed that the power of the "corporate authorities" mentioned in the law of 1844, and the probate judge in that of 1864, is limited to the act of entry, and when the land is entered the party or parties so entering it become invested with a trust, the execution of which is under the sole and exclusive direction of the local legislature. Until the legislature points out the method and prescribes the rules of procedure, the trustees are wholly incapable of conveying the legal title to the beneficiaries of the trust, or of disposing of the land for any purpose, or to any person. But what is the character of this trust? It will be observed that, while the entry under the act of 1844 is only allowed to cover such land as is actually occupied by the settlers, it must nevertheless be made according to government subdivisions, as the law does not permit them to be broken in upon. Under this rule some land would be found in each subdivision not actually built upon or otherwise occupied for town purposes. What, then, is to be done with this land not occupied or improved? To whom is it to go? Clearly not to general government, for its title has ceased by the issuing of the patent. Not to the territory, for it never had any interest. Not to the trustee, for he is a mere conduit or channel through which the title passes from the government to the *cestuis que trust.* Not to the individual citizen, for the act of congress defines the extent of his individual interest. The trust is manifestly a double one. The first, a trust for the occupants of the town as individuals; the other, a trust for them collectively, as a community; the act authorizing the corporate authorities to enter the land in the first case, and making them trustees, and the judge of the probate court to enter the land and become the trustee in the other. If we pass from

the law of 1844 to that of 1864, we find that the land to be entered is designated by sections and subdivisions, and we encounter the same question: What becomes of the land not occupied and covered with improvements? And to this question we are forced to answer that the probate judge holds it in trust for the community. In neither of the laws does congress attempt to define or mark out the line that distinguishes the individual from the public trust; that is, to what extent individual occupancy shall be permitted to displace public occupancy or the occupancy of the community as such. This whole matter is left to the local legislature. To it belongs the creation of the tribunal before whom individual rights shall be adjudicated. It prescribes the kind of evidence necessary to make good a claim of title. It prescribes what kind of disposition shall be made of the money arising from the sale of lots, and, in fact, has full and plenary power over the whole subject-matter of the trust, and to strengthen this power conferred by congress the law declares that any act done by the trustee, inconsistent with or in violation of the rules and regulations prescribed by the legislature for the execution of the trust, shall be void and of none effect. Congress seems to have contented itself with declaring simply who might enter the land and denominating the *cestuis que trust*, all else it hands over to the territorial legislature, which is better fitted, on account of its proximity to the subject-matter of the trust, to supervise and direct its details. There can be but little difficulty in comprehending the whole subject if we keep steadily in view the object had in the passage of the acts, namely: To extend protection to citizens of the towns and cities that had grown up on the government lands for commercial and mechanical purposes, and to secure to them severally, at the minimum price, all land actually occupied by them respectively for city or town purposes, and to them collectively such other lands as might be included within the limits of the town or city.

Before the rights of the individual claimants could be fully secured it became the duty of the legislature to pre-

scribe the rules and regulations which would not only put the trustee in motion, but define the manner and extent of his action. This it did. It pointed out the method in which the trust as to these parties should be executed. It prescribed what steps should be taken to secure their legal titles, and empowered the probate judge or trustees to make conveyances to those justly and rightfully entitled to receive them. These rules and regulations were imperative upon him. They were the charter of his power and could not be disregarded. What they authorized, he could do, and beyond them he could take no step. By an oversight, the legislature made no provision for the disposition of portions of this land to which no individual claim existed, and there is nothing in either act of congress from which a power of sale in the trustee can be inferred, and much to repel such an inference. The acts of congress leave it altogether to the territorial legislature to determine what disposition shall be made within the objects of the trust of town lots belonging to the community at large, and of the proceeds of such of them as may be sold. This part of the trust most clearly cannot be executed without the intervention of local legislation.

The trustee cannot sell under the acts of congress, because they do not authorize him to sell any portion of the trust property, or to make any disposition whatever of moneys that might come into his possession on such sale. It being evident that it was the intent of congress that the lands included within the town site, and to which no rightful claim exists on the part of any individual, should be sold and the proceeds disposed of under the directions prescribed by the legislature, who are to establish rules and regulations for the whole execution of the trust, and it being further evident that the legislature failed to provide for the disposition of the same, it is clear to us that any sale of such land, made by the probate judge or trustee, in the absence of these rules and regulations, was wholly unwarranted, and absolutely void. It was an exercise of power of which he was not possessed. It was entirely

competent for him to make conveyances to those having a valid and rightful claim to land at the date of the entry, provided they furnished the proper and requisite proof—beyond this, his acts were *ultra vires*, and could in no manner affect the rights of the community. It was his duty to await the action of the legislature. Section 6 of the act of February 9, 1866, does not provide for a sale of this land, but affects to give the lots to the city of Denver, and is, therefore, void.

But, notwithstanding this fact, we are clearly of the opinion that if the probate judge made sales of these lands, it is competent for the city of Denver, in its corporate authority, standing as the guardian of the interests of the community within the limits, to institute and maintain suits to have such sales set aside, and conveyances canceled, and to keep watch over this property until such time as the legislature shall authorize the sale, and when sold it is competent for the legislature to order that the money arising therefrom shall be applied to the erection of public buildings, for the use of said city, or be appropriated for the support of its public schools, or any other general purpose that will conduce to the interests of the community.

While we are thus clear that the city of Denver is entitled to relief, another question remains, namely, whether it must seek it by separate suits against each individual implicated in the transactions, or whether it is at liberty to bring them all into court at one time. The bill in this case charges that the conveyances which are sought to be set aside were made by different probate judges, at different times, and to numerous persons, and it is, therefore, claimed by the appellees that the bill is multifarious. In the case of *Salvidge* v. *Hode*, 5 Maddock's Ch. 94, the vice-chancellor says: "In order to determine whether a suit is multifarious, or, in other words, contains distinct matters, the inquiry is not whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of the bill be single, but it happens that different persons have separate interests in distinct questions, which

arise out of that single object, it necessarily follows that such different persons must be brought before the court, in order that the suit may conclude the whole subject." The case of *Brooks* v. *Lord Whitworth et al.* was a case where an estate was put up and sold in several lots, and the bill was filed against various purchasers, six in number, praying that an account might be taken, and that the sales to the purchasers might be completed, and the remainder of the purchase-money paid in. To this bill a demurrer was filed, charging that it contained several and distinct matters that had no relation to each other, and in the greater part of which the defendant was in no way interested, and ought not to have been implicated. In deciding upon this demurrer the vice-chancellor says: "The court is always averse to a multiplicity of suits; but certainly a defendant has a right to insist that he is not bound to answer a bill containing several distinct and separate matters relating to individuals with whom he has no concern. A decisive objection to the bill is that the purchases of the different lots were made by distinct persons, each agreement being separate and distinct. The circumstances attending the sale of one lot may be very different from those relating to other lots. One may have objections, another has not." 1 Maddock's Ch. 58. In the case of *Rayner* v. *Julian*, 2 Dickens, 677, the bill was demurred to on the ground that it was multifarious. Lord KENYON says: "Suppose an estate is sold to different persons, a plaintiff could not include them all in one bill for specific performance; for each party's case would be distinct, and would depend upon its own peculiar circumstances, and there must have been a distinct bill upon each contract." See, also, *West* v. *Randall et al.*, 2 Mason, 200. We cannot see why a different rule should apply in this case.

We are aware that it is a favorite object with courts of equity to prevent multiplicity of suits. For this purpose it is a general rule in chancery that all persons materially interested must be made parties, the forms of proceeding in chancery and the power of the court to mold its decrees,

so as to suit the various equities of the case as established by the proof, enable it advantageously to settle and adjust in a single suit, rights and interests which, according to the rules of pleading in the courts of common law, would necessarily result in various issues incapable of being tried in a single case and disposed of by a single judgment. But, notwithstanding this disposition of a court of equity to prevent the multiplication of suits, it will not permit several plaintiffs to demand by one bill several matters perfectly distinct and unconnected against one defendant, nor one plaintiff to demand several matters of different natures against several defendants; and the reason of the rule is said to be that such a proceeding would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with a statement of the several claims against the other defendants with which he has no connection, and also to prevent confusion and to preserve some analogy to the comparative simplicity of declarations at common law. See *Fellows* v. *Fellows*, 4 Cowen, 680.

We see no error in the action of the court in sustaining the demurrers to this bill, on the ground that the same was multifarious; we have not considered whether an absolute dismissal of the bill may prejudice the right of the city to institute another suit, but, to save all questions of that nature, we reverse the decree of the district court and direct that court to enter a new decree dismissing the bill without prejudice to the rights of the complainant therein, this, of course, without costs.

WELLS, J., dissenting. I think the complainant's bill shows no equity, and that the decree of peremptory dismissal, given in the district court, ought to be affirmed.

The question turns upon the construction to be given to the act of May 23, 1844, and as this case is one of great importance, I shall briefly set forth the reasons which compel me to differ from the other members of the court.

No bill in regard to the subject-matter of this action will lie at the suit of the present complainant, unless by the act

of congress a trust was created in some portion of the town site for the citizens of Denver as a community; or unless the legislature are by that act authorized to create such a trust.

I think that neither of these positions can be maintained.

The act of May 23, 1844 (5 Stats. at Large, 657), was intended to supply a defect in existing pre-emption laws. It is part of a system. It declares, in the opening clause, that, because lands settled upon as a town site are not subject to entry under existing pre-emption laws, therefore this legislation; it must therefore be supposed to have been inspired by the same reasons of policy, as the several preceding acts in addition and supplement to which it was enacted, that is to say, to encourage actual settlement in the public domain, and it ought not to be taken by intendment that the purpose of congress was to encourage or permit speculation in town sites, or to give special bounties to a few; or to so provide, that a few or many speculators might engross great tracts of the public domain, the prospective centers of population, which before that act were the common property of all citizens of the United States. The consequences here alluded to are, I think, the legitimate and almost necessary result of the doctrine of the majority opinion in this case; for, as I understand that opinion, the first ten men, or a less number, who settle at a frontier post may engross the whole of three hundred and twenty contiguous acres: so much as they severally occupy they may procure to be conveyed to them in severalty, and the residue which no one occupies and in which but for this enactment certainly no one of them, nor all of them collectively, would have any right whatever, is to be sold for their benefit, and they themselves may become the purchasers at nominal prices.

It is not certain of course, that such an abuse of the supposed donation will in any case occur; but it will be exceedingly probable in every case, and the more certain the future of the particular location and the greater the necessity and the propriety that it should not be engrossed

by a few for purposes of speculation, the greater is the probability that it will be.

Before I can accede to the doctrine that it was the intent of congress to create a trust so liable to fraud and abuses, and so contrary in its probable results to the spirit of all prior legislation, I must find a clear warrant for it in the words of the act, and I think the words of the act admit of no such interpretation.

The act declares that the entry of the town site shall be made "in trust for the *several* use and benefit of the *occupants thereof according to their respective interests.*"

Now, when ten or twenty or more families or individuals congregate and so form what is termed a town or vill, there is always an occupation of lands in severalty by each of the community; this is the usage of our race. Generally, I believe, at least in the west, a survey into lots and blocks has preceded or shortly followed the first settlement, in order to precisely mark out and ascertain the bounds and extent of the right and possession of each individual settler, but whether there be such survey or not, I think it may be said invariably, the right and occupation of each settler has been wholly several and separate; there are no common fields as with the early settlers of French and Spanish extraction, but they hold their lands like their goods, each his own, to and for himself.

This habit and usage of severalty in the occupation and ownership of lands was certainly within the knowledge of congress, and from the language used may be inferred to have been in contemplation in the passage of this act; and it was, I think, the several and separate occupancies of the individual settlers, which it was intended to protect and secure.

Nor do I think, that it was the intent of the act to extend its benefits beyond this; for beyond those separate lots and parcels which come within the several occupancy of the individual settlers, every thing is vacant; it cannot be fairly said that, in such case, the community collectively occupy the whole of the town site. An invading army are said to

occupy the towns and cities of the nation invaded, and each individual settler or inhabitant of the town occupies his own close and premises; but if this word is ever used to express the residence of the whole population of a town upon the several quarter sections of land upon which it is built, this is not the common and ordinary use of the word, and it is the common and ordinary sense in which the words of the statute are to be received. But the statute limits the trust estate to the several use and benefit of the occupants, according to their respective interests; beyond the several occupation of the individual settlers as before shown, there is no occupation, and beyond this, no settler has any interest whatever.

It follows then, that, except as to those lots which are actually occupied at the date of the entry, the trust does not then inure. But there is no provision that the land shall revert, nor certainly can the trustee hold it discharged of the trust; the result is, that the trust remains in abeyance until, by subsequent occupations from time to time, the beneficiaries are appointed.

But, in the clause of the act which follows what I have already quoted, it is provided that the execution of the trust "as to the disposal of the lots in such town, and the proceeds of the sales thereof to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or territory," etc.

It is thought that by these words it was contemplated that some portions of the domain shall be sold, and the argument is, that there can be no sale of the occupied lots; that, as to them, the sole duty of the trustee is to convey to the several occupants; that whatever is implied from the words now under consideration, must therefore apply to the unoccupied portions only, and herefrom is deduced a power and duty in the local legislature to direct a sale of these portions, and prescribe the manner of it and the disposition of the proceeds which it is said may be appropriated to any public uses in their discretion.

The reasons which compel me to dissent from these conclusions are, briefly, as follows:

The clause of the act now under consideration relates to a matter merely incidental and subordinate to what precedes it. In what precedes this clause, as I have attempted to show, the trust estate is granted, and the trustee and the beneficiaries are appointed, and the several interests of the latter are fixed and determined. What follows relates merely to the execution of the trust; and I take it to be a rule of construction that, where, by statute, a particular thing is clearly granted, and other words follow regulating the mere incidents of the principal thing, such as time, place, manner, etc., the latter word shall not have the effect to enlarge or limit what is before granted or prescribed, unless this is necessary to give them effect.

Is it necessary, in order to give effect to this latter clause, to say that there should be a sale of some portion of the several lots within the location? I think not. In order to every entry of a town site under this act, the minimum price for the lands must first be paid by the trustee, either of his own moneys, or by provision of the State or territorial authorities, or of the citizens of the town or some of them; these moneys, at least it will be agreed, the local legislature may require the occupant to pay to the trustee before he shall be entitled to receive a conveyance; and this is the price which each occupant pays for his several interest and portion. The transaction may, I think, be fairly enough termed a sale, and the moneys paid by the settler to the trustee the proceeds of such sale. Unless the trustee had advanced his own moneys, legislation would be necessary to insure the proper disposition of the proceeds in his hands, and this is, I think, what was intended by the words in question. If, however, I am in error as to the construction to be placed upon these latter words—if it was contemplated that, under the act, there must be a sale of all lots which might in any particular case be unoccupied at the date of the entry—then I am clearly of the opinion that the proceeds must be divided among those who were occupants at the date of the

entry (or possibly at the inception of the proceedings for entry), and that no other persons are, or can become, entitled to share therein, for the trust is expressly declared to be for the "several use and benefit of the occupants," and there is no syllable in the act which negatives or qualifies this intention, or gives color to the idea that a joint use was intended either in the lands or their proceeds.

The city of Denver, therefore, has no interest whatever in these lots or their proceeds, and can have none by any legislation of the territory, for this would be to create a joint use where the statute has prescribed a several one, and a use not alone to the occupants at the date of entry (who, according to the majority opinion in this case, are the sole beneficiaries), but to them and to all who may come after them to the end of time.

I dissent, therefore, from the reasoning of the court, and from so much of the order as directs a modification of the decree which was given in the court below.

Reversed.

---

1 352
36 124

THE PEOPLE ex rel. BAXTER et al. v. HALLETT.

JURISDICTION — *mandamus to district judge.* This court has jurisdiction of an application to compel a judge of a district court to recognize a district attorney.

DISTRICT ATTORNEY — *qualifications.* Whether one who was not a licensed attorney at the time of his election was eligible to the office of district attorney, the court was not agreed.

PRACTICE — MANDAMUS — *where the court is divided in opinion.* Upon application for mandamus, if the court is equally divided in opinion, the writ will be denied.

Petition for mandamus.

THE proceeding was against the chief justice, and BELFORD and WELLS, JJ., were not agreed upon the principal point, and therefore the writ was denied.

Mr. H. C. THATCHER and Messrs. MILLER & MARKHAM, for petitioners.

Mr. W. C. KINGSLEY and Mr. N. HARRISON, for respondent.

BELFORD, J. This is an application for a peremptory writ of mandamus to issue against Moses Hallett, judge of the third judicial district, to compel him to recognize Marmaduke Green as the prosecuting attorney of that district.

It appears that at the election, held in September, 1870, Green was, by the votes of the qualified electors of the third district, elected prosecuting attorney. He received his certificate, took the prescribed oath, filed a suitable bond, received his commission from the governor, and entered upon the discharge of his duties. At the December term of the Pueblo district court the respondent, then presiding as judge, refused to recognize Green as such prosecuting attorney, because he was not, as the order of the court alleges, an attorney of said court, or authorized to appear therein. It is admitted on both sides that, at the date of the election, Green was not a licensed attorney. On behalf of the relators, it is claimed that the people having elected him to this office, he is entitled to discharge the duties and receive the emoluments of the same, and that the action of the court in refusing to recognize him is not only revolutionary in its character, but, if permitted to ripen into a precedent, would subvert the principles of our government and overthrow the rights of its citizens. On the other hand, it is contended that the statutes of the territory prescribe who shall be attorneys, and make it an indispensable prerequisite to the practice of the law in our courts, that a license shall be obtained from the supreme court, and until it is obtained, no man, however great may be his abilities, is entitled to standing or recognition at the bar of the judiciary. I fully conceive the vast importance of the principles involved, but shall not shrink from their discussion. If permitted to have any choice as to the causes that should come before me, this is one of the last I would desire to entertain, but no

choice is left. This court is bound to a single duty, and that is, to decide the causes brought before it according to law, leaving the consequences to fall where they may.

It has been well said that, in order to maintain a system of government which will be able to secure to the citizen his rights, it is necessary to have persons appointed or chosen to administer the law. And, when persons are thus clothed with the power and have assumed the duties of a public officer, they have taken upon themselves the obligation to perform those duties, and if they neglect or refuse to do so, any one whose rights are thereby injuriously affected is entitled to demand relief. The remedy provided by our system of law, as well as that of England, is a process, issuing from the judicial branch of the government, which seeks to compel the officer to go forward and to do that which is enjoined upon him by the position he holds. This process is denominated a writ of mandamus, and when there is a right to execute an office, perform a service, or exercise a function, more especially if it be a matter of public concern or attended with profit, and a person having such right is wrongfully kept out of possession or dispossessed of such right, and has no other specific legal remedy, the court will interfere by mandamus upon reasons of justice and of public policy to preserve peace, order and good government. But, while the judiciary is thus clothed with this extraordinary power, it is never exercised, except to enforce a *legal right.* It cannot be invoked to place one in office or to secure him in the enjoyment of the same, if it is manifest that he has no title. If, at the date of the election, Green was an ineligible candidate, and legally disqualified from holding the office of prosecuting attorney, the people who elected him were bound to take notice of this ineligibility and disqualification, and no vote that they could cast and no commission that he could receive could remove or cure the infirmities or disabilities which attached to him. While the will of the people is sovereign, still it must be expressed in accordance with recognized public law, and when it exceeds the limits of this, it is the duty of courts to interfere and by judicial

checks afford the people time for reason and reflection. Before proceeding to an examination of our statutes on this subject, it will not be out of place to inquire what an attorney is. "An attorney at law," says Blackstone, "answers to the *procurator* or proctor of the civilians and canonists. And he is one who is put in the place, stead or turn of another, to manage his matters of law. These attorneys," he adds, "are now formed into a regular corps; they are admitted to the execution of their office by the superior courts of Westminster Hall and are in all points officers of the respective courts in which they are admitted, and as they have many privileges on account of their attendance there, so they are peculiarly subject to censure and animadversion of the judges. No man can practice as an attorney in any of those courts but such as have been *admitted and sworn* an attorney." So early as the statute 4 Henry IV, chapter 18, it was enacted that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned and sworn to do their duty. And many subsequent statutes have laid them under further regulations. The statute in this territory is not much unlike those in England. Section 1 provides: No person shall be permitted to practice as an attorney or counselor at law, or to commence, conduct or defend any action, suit or plaint in which he is not a party concerned, in any court of record within this territory, either by using or subscribing his own name or the name of any other person, without having previously obtained a license for that purpose from some two of the justices of the supreme court, *which license shall constitute the person receiving the same an attorney and counselor at law*, and shall authorize him to appear in all courts of record within this territory and there to practice as an attorney and counselor at law, according to the laws and customs thereof; * * * and to demand and receive all such fees as are or hereafter may be established for any services which he shall or may render as an attorney and counselor at law in this territory. Section 2 provides that no person shall be entitled to receive a license until he shall have obtained

a certificate from the court of some county of his good moral character, and also a certificate from one or more respectable counselors at law, that he has been engaged in the study of the law for two successive years prior to the making of such application. Section 4 makes it the duty of the clerk of the supreme court to make and keep a roll or record, stating that the persons whose names are therein written have been regularly licensed and admitted to practice as attorneys at law within this territory. Section 5 provides: And no person, whose name is not subscribed to or written on said roll, with the day and year when the same was subscribed thereto or written thereon, shall be suffered or admitted to practice as an attorney or counselor at law within this territory.

From reading this statute it is evident that the intent of the legislature in passing it was to elevate the standard of the legal profession, by excluding from it those who had not made the science of the law a matter of study. To guard the interest of the community, and to preserve from violence and injustice the rights of individuals, the legislature emphatically declares that no person shall be permitted to practice as an attorney at law, or to commence, conduct or defend any action in which he is not a party concerned, without having previously obtained a license. He may commence and manage his own case, but if he declines to do this, he cannot employ another individual to attend it for him, unless that individual has qualified himself for the task by two years' study. This evidence is the license under the sign manual of two of the justices of the supreme court, and, in the language of the statute, "this license shall constitute the person receiving the same an attorney at law, and authorize him to appear in court." Without that license he cannot appear; it is his passport to the bar. It is the charter that gives him a right to be heard; it is the authority which empowers him to collect fees for services rendered, and if he does not have it, the court can rightfully and properly refuse to recognize him, although his talents may not be inferior to those of a Webster or a Choate.

Can it be said that the legislature intended to confine this statute to civil suits alone? Does all this legislative solicitude center upon dollars and cents, while the rights of life and liberty are turned adrift to be sported and trifled with by any one whom the people in their partisan madness and frenzy may elect and call prosecuting attorney? And, can it be said that this court ought to issue a writ of mandate to compel the judge below to violate this clearly-expressed public law? When the statute says, "that no person shall be permitted to commence, conduct or defend *any action* without a license as an attorney," do the words, "any action," simply mean any civil action, or do they apply to all kinds of actions entertained and heard in courts? Is there any less necessity for a knowledge of the law when a man is on trial for his life than there is when the contest is confined to property? Shall we impute to the legislature a shameful disregard of man's dearest and most vital interests, by holding that an act, designedly passed, to preserve the character and dignity of a profession that in all ages has been the bulwark of society, and into whose hands the most sacred trusts are and have been committed, fails to give protection when protection is most required? And this we will do, if this statute is so construed as to confine its provisions to attorneys merely employed in the trial of civil cases. It must be observed, also, that this act, defining the duties of the district attorney, devolves upon him the necessity of appearing in behalf of the territory and the several counties of his district in all indictments, *suits and proceedings*, where the territory or the people thereof, or any county of his said district may be a party. His duties, therefore, embrace something more than criminal business. It touches upon — nay, he must enter into the domain, where admission as to all others is only secured by a license. But it is contended that the act creating the office of district attorney does not require that such officer shall have been admitted and licensed as an attorney. True, it does not, but it is a well-settled principle that, in giving construction to any statute, the legislature must be understood

to have used terms and phrases in the sense in which those terms and phrases for long years prior had been understood and received in relation to a particular subject. Another well-established and fundamental rule of construction is, that all acts and provisions of the law, in *pari materia*, are to be taken and considered together. It follows, therefore, that, in construing the act under examination, we must look to the object and purpose of the legislature as gathered from the light of surrounding circumstances, and as illustrated and explained by the previous legislation in this and other States relating to the same subject.

Another rule of construction is, that where the same or similar words are used in a statute, which are found in a previous statute, relating to the same subject-matter, the latter act must receive the same construction as the former. In many of the States this representative of the people is selected by the courts. The manner of creating the office can make no difference; the question is, can such an officer be selected from among those who are not attorneys — officers of the court? It cannot be done, because no attorney can appear as an officer of the court who has not been admitted to practice. Appointment by the governor or election by the people confers no authority to appear in court. The person elected is not called prosecutor but prosecuting or district attorney. The very words pre-suppose the individual to be an attorney, and, while in such capacity, to be elected a district attorney or an attorney to prosecute the pleas of the territory. The election does not confer on the individual the privilege of being considered an attorney if he was not one before, but, having the attorney's privilege in court, he can, by appointment or election, appear in behalf of the people to prosecute and have his designation "district attorney" or "prosecuting attorney." The experience of every member of the bar will teach him that this is the universal and accepted construction given to acts of the character now under consideration. But, to make clearer this principle, let me illustrate it by an example: A B is elected prosecuting attorney, qualifies and enters upon the

discharge of his duties. During a term of court he is disabled and becomes incapable of attending to his duties. To prevent a failure of justice, the court must appoint a prosecutor; can it be contended that the judge could appoint to such office one who had never been admitted to practice law, or, if he should assume to do so, would it not be an abuse of his powers? But, it is said, that the statute fixes no grade of ability for this office. True, it does not, and, generally speaking, eminent qualifications have nowhere been held to be indispensable to the occupation of office; but the statute has, at least, enjoined one thing; and that is, whether the individual has one or ten or twenty talents, he shall not be permitted to display them, as an attorney at law, in the courts of justice, until he has spent two years in burnishing them up, and has a certificate to that effect. Fortunately we are not without authority on this subject.

In the case of *The People ex rel. Hughes* v. *May*, 3 Mich. 598, it is held by the court that no person who has not been previously admitted as an attorney at law is eligible to the office of prosecuting attorney. The Michigan statute is like our own. The people there elected May district attorney. Prior to the election, he had not been admitted as a member of the bar, and had not received a license, and the supreme court held that he was clearly ineligible, and sustained a judgment of *ouster* on that ground. MARTIN, J., in delivering the opinion of the court, says: "Among the well-settled rules of construction of statutes are these: 1st. The natural import of the words of any legislative act, according to the common use of them when applied to the subject-matter of the act, is to be taken as expressing the intention of the legislature, unless the intention so resulting from the ordinary import of the words be repugnant to sound acknowledged principles of public policy.

"The *natural* import of words is that which their utterance promptly and uniformly suggests to the mind, that which common use has affixed to them; the *technical* is that which is suggested by their use in reference to a science or profes-

sion, that which particular use has fixed to them, and when the natural and technical import unite upon a word both their rules combine to control its construction, and, indeed, it is difficult to understand how any other signification, than that which they suggest, can be affixed to it, unless upon the most positive declaration, that a different one was designed. Now, the word "attorney," when used in connection with the proceedings of courts, and the authority to conduct business in them, as well as when employed in a general sense with reference to the transaction of business, usually and almost necessarily confided to members of the legal profession, has a fixed and universal signification on which the technical and popular sense unite. The legislature and the judge, the lawyer and the layman, understand it alike as having reference to a class of persons who are, by license, constituted officers of courts of justice, and who are empowered to appear and prosecute, and defend, and upon whom peculiar duties, responsibilities and liabilities are devolved by law in consequence. That the natural and technical import of the words or title "prosecuting attorney," are identical, I shall not stop to argue at length, and common experience teaches us that they suggest to every person alike the idea of an *attorney at law*, set apart to conduct the public business, whether of a civil or criminal nature, and perhaps primarily, that of a criminal character."

In the case of *The Commonwealth* v. *Adams*, 3 Metc. (Ky.) 6, it was held that one elected to the office of county attorney to which he was ineligible, not having been a licensed practicing attorney for two years, and exercising the functions and receiving the emoluments of the office, is guilty of usurpation of office and liable to indictment. It is insisted, however, that the right to an office cannot be determined by an action, other than a proceeding in the nature of a writ of *quo warranto*. Mr. Blackwell, in his treatise on tax titles, says, in writing of officers *de facto*, "the only appropriate mode of testing the title of a person to an office is, by an information in the nature of a writ of *quo warranto*, in which, after notice and impartial hearing, he will

be ousted from the office, if it turns out that he has been exercising official functions without the warrant of the law. Until then, he holds the office by sufferance of the State, and the silence of the government is construed by the courts as a ratification of his acts. When the government acquiesces in the acts of such an officer, third persons ought not to be permitted to question them." Id. 117. While I yield my assent to the doctrine here enunciated in the broadest extent, I am not unmindful of the existence of another principle equally well settled, namely, that when a party having been deprived of the use of an office comes into a court and applies for a writ of mandamus to restore him, the writ will never be awarded when it is clear and manifest that the party applying for the same was, at the date of his election, ineligible, and when it is patent that if restored he could be immediately ousted by a writ of *quo warranto*.

The papers in this case show that, at the date of Green's election, he was not a licensed attorney, and he was not entitled to practice in the courts of this territory, and, I think, I have already shown that the absence of this license rendered him incompetent to exercise the office of district attorney. Can it be said that one who shows himself not entitled to an office has a right to this writ? I know of no case that sanctions such a claim It is, perhaps, the correct theory in reference to an office elective by the people, that the fact that an *eligible* person is duly chosen to fill the same, confers upon him the right, the title to such office, or the certificate of election or commission, is, in some respects, something like a deed to land, the mere evidence of such title. This title gives the right to exercise the accustomed or fixed duties of the office, and receive the fees and emoluments therefor. In this right, it has been often contended, there may exist a franchise to which the rights of property may attach for certain purposes. But this title vests in and these rights inure only to an eligible person. See *Glassock* v. *Lyons*, 20 Ind. 2; *Allen* v. *McKean*, 1 Sumn. 317.

In coming to the conclusion that I have reached, I have not been unmindful of the delicacy and importance of this

question, nor regardless of the rights of the people to exercise the electoral right, untrammeled by any conditions or restrictions, except such as are expressed by law. But such conditions and restrictions, when established, are to be enforced as well as the right itself. I am not at liberty to disobey the law as an individual, nor do I possess that right when acting with thousands of others. Nor can I consent that a writ of mandamus shall issue to the judge below, when its force and effect is to compel him to do an act, the performance of which is a palpable violation of law. For the reasons I have given the writ should be denied.

WELLS, J. Although I at first doubted, I am now satisfied that the court has jurisdiction to entertain this application; the court to which the writ is prayed is within the supervisory jurisdiction of this court; the duty sought to be enforced is of public concern, and is not judicial in its nature, nor one about which that court is called upon to exercise a discretion.

The election of Mr. Green, his qualification in office, and his entry upon the duties thereof, are admitted, and the sole ground of his exclusion was that he had not been admitted to the bar of this court, and that, by reason of ignorance of the law and the usage and practice of courts, he was incompetent to discharge the duties of his position.

But the statute has not prescribed any qualification of learning or admission as an attorney, to confer eligibility to this office, and I think courts ought to be slow to give to the general words of a statute such effect as to limit the right of the people to exercise their preference in filling the offices within their gift. Undoubtedly it is more proper that the person elected to manage the causes of the people should be a member of the bar and in practice, for this affords an assurance in some degree of his competency to discharge the duties of that position. Probably, too, it was generally supposed, when the act creating the office of district attorney was passed, that an attorney at law would

be chosen by the people, but I see nothing in this mere propriety, nor in the name by which the law designates the official, to warrant me in concluding that the legislature intended to restrict the suffrage of the people to a single class. The people have the power and the right, both by their inherent sovereignty and by prescriptive usage, to elect incompetent men to office; and if the legislature may lawfully limit the exercise of this right, and say that certain privileged classes shall exclusively exercise certain offices, they have not clearly said so as to this particular office, and I think we ought not to strain the text of the statute to limit the exercise of the elective franchise. It is a precedent full of danger. The authorities which are cited in support of the contrary view are not, in my opinion, entitled to controlling consideration.

In May's case, 3 Mich. 598, the opinion of the court is based upon the construction of a series of statutes which never were in force here.

In Adam's case, 3 Metc. 7, it appears that there was an express statute prohibiting any one not a licensed attorney from exercising this office. The opinion of my associate, therefore, rests solely upon the fitness and propriety that the legislature should have made this restriction and the mere circumstance or accident, that the legislature in denominating this office have used a word which indicates a person licensed by the courts to manage the causes of others for a reward.

But however this may be, it appears that in this case Mr. Green had not only been elected and commissioned, but he had entered upon his office and was in the actual exercise of its duties and functions. He was, therefore, an officer *de facto* by a colorable title, and he had a property in his possession of the office, however ineligible, of which he could lawfully be ousted only *by due process of law*, and due process of law is, in this case, nothing less than the judgment of a court of competent jurisdiction in a direct proceeding after notice to the incumbent and opportunity given him to be heard upon the question of his right.

It is not as if the prior incumbent had refused to yield the office and asserted the invalidity of Mr. Green's election; in such case upon *quo warranto* brought, I apprehend the court might have investigated the question of the relator's eligibility.

But the prior incumbent yielded the office, and Green entered into it and had possession, and whether lawfully elected or not, he had a property in that mere possession of which he could no more be deprived by a summary order of court than of a freehold in lands. It is idle to say that he does not now show a lawful title to the office, his possession was his title, and that must suffice until lawfully dispossessed. If the courts may, for any supposed disqualification, exclude by a mere order the district attorney elected by the people, the same power certainly extends to the sheriff, and for any thing I can see, if Mr. Green may be excluded of his office, so may the attorney of the United States; the official denomination of the two is identical; the statutes of this territory, upon which the opinion of my associate is based, certainly govern both; the one is as much an officer of the court as the other, and the former, quite as truly as the latter, holds his office from a power above and beyond the courts.

And if the authority which was claimed and exercised in the case of Mr. Green exists at all, it is difficult indeed to say that it does not extend to all public officers whatever; unless those who exercise their functions beyond the precincts of the courts of law hold by some superior tenure, and this cannot be admitted.

I am of opinion that Mr. Green was unlawfully excluded from the office of district attorney, and that a peremptory mandamus ought to issue according to the prayer of the relator.

Writ denied.

THACKARAY v. HANSON.

1 365
9 577

CONTINUANCE — *affidavit must set out material facts.* If the facts set out in an affidavit for continuance are not competent in defense under the state of the pleadings, the continuance should be denied.

In an action on a promissory note, one of the defendants moved for continuance upon the ground, that an absent witness would testify that the words "president" and "secretary" had been cut from the signatures to the note. These facts were not material except to show that the note was executed on behalf of a corporation, and was not the note of the defendants. The execution of the note was not denied by plea, verified by affidavit, and therefore the evidence was not admissible, and the motion for contiuuance was properly overruled.

PROMISSORY NOTES — *all are negotiable.* Under our statute (Rev. Stat. ch. 1084), all promissory notes and instruments for the payment of money are negotiable, whether so expressed or not, and a note which does not contain the words "or order," is negotiable in the same manner as if it did contain those words.

PLEADING AND PROOF — *variance in description of promissory note.* A promissory note expressed to be given for cash borrowed may be described in the declaration as given for value received.

Error to Probate Court, Clear Creek County.

Mr. HUGH BUTLER and Mr. R. S. MORRISON, for plaintiff in error.

Messrs. JOHNSON & TELLER, for defendant in error.

WELLS, J. The defendant, in his affidavit for continuance, swore that he expected to show, by the absent witness, that the promissory note sued upon was executed by the witness and defendant as president and secretary respectively of a certain mining corporation, and on behalf thereof, and that after its execution, and before the commencement of the action, it had been fraudulently altered without the knowledge or consent of either witness or defendant, by cutting from the end thereof the words "president" and "secretary" appended to the signatures of witness and defendant respectively.

A continuance ought not to have been granted, unless the facts set forth by the affidavit were competent matters in

defense, under the state of pleadings. These matters cannot be said to be competent or admissible, except as tending to show that the note declared upon never was the undertaking of the defendant, for the liability of the defendant was not affected by the alteration, unless made in a material part, and there was nothing material in the words stricken from the note, unless they are to receive effect as rendering parol evidence admissible to show that the note was executed in a representative capacity, and was, therefore, the note of the principal and not of the agent. It is manifest, therefore, that the evidence to obtain which a continuance was sought, whether directed to the avoidance of the note by reason of the alteration, or to the capacity in which the defendant contracted, involves the same substantial matter of defense, that is, that the note was not the undertaking of the defendant, and in either view, the defendant having failed to verify his plea, such evidence could not be received even though the witness had been present.

What is here said will not, however, be understood as going beyond the particular case here presented, nor certainly as impairing or denying the rule that an alteration apparent on the face of the instrument must be explained in order to its admission in evidence, for, whether such apparent alteration may or may not be taken advantage of under an unsworn plea, is a question not presented by this record, the alteration alleged in this case being one which it seems to us could not be apparent upon the face of the paper.

The motion for a continuance was, therefore, properly overruled.

The note counted upon is described in the declaration as payable to the order of the plaintiff for value received; the note offered in evidence upon the trial was payable to the plaintiff without other words, and was expressed to be for cash borrowed; objection was made on the ground of variance in these respects, which objection being overruled, an exception was saved, and this decision of the court is now assigned for error.

Under the English statutes, and in most of the States of the Union, words of negotiability are requisite to give an assignable quality to commercial paper; where the law is so, such words are a material part of the note, and the instrument must, in pleading, be correctly described in this respect. Under our statute, however, all promissory notes and instruments for the payment of money are negotiable whether so expressed or not, and whether the particular instrument contains the words "or order," or equivalent words or not, its legal effect is the same as if it did contain such words. In describing such instrument, therefore, if it be declared upon as payable to the plaintiff directly, when, in fact, it is payable to his order, or, as payable to his order, when, in fact, payable to him directly, in either case there is no variance, for the contract is described according to its legal effect.

The second allegation of variance seems to be equally without foundation. It is said, in Byles on Bills, 64,* that, "though the nature or particulars of the consideration appears on the bill or note, it is not necessary to state it in the declaration, or it may be stated generally as value received."

We perceive no error in the record, and the judgment is therefore affirmed.

Affirmed.

SCHOOL DISTRICT NO. 8, JEFFERSON COUNTY, *v.* ERSKIN.

ATTORNEY IN FACT — *to execute appeal bond.* If authority is given by statute to the president of a school district to execute an appeal bond on behalf of the district, the district may nevertheless confer the same authority upon its secretary. A party may have several agents appointed to do the same thing.

APPEAL BOND *may be amended.* If, on appeal from a justice of the peace, the bond was executed by the secretary of the district in good faith, but without authority from the district, it was amendable. The statute (Rev. Stat. ch. 50, § 45, 407) on this subject applies to every case in which an honest effort is made to appeal the cause.

Appeal from District Court, Jefferson County.

MR. A. H. DE FRANCE, for appellant.

No appearance for appellee.

HALLETT, C. J. Appellee brought suit against the school district before a justice of the peace, and recovered judgment, from which the latter appealed to the district court, and filed a bond, to which the name of the district was signed by the secretary thereof.

In the district court, appellee moved to dismiss the appeal upon the ground that the bond was not executed by appellant, which motion was allowed, and a motion by appellant for leave to file a good and sufficient bond was denied.

The school law (Rev. Stat. 580) provides as follows: "The president shall appear in behalf of his district in all suits brought by or against the same, but when he is individually a party this duty shall be performed by the secretary;" and probably it was thought that this conferred upon the president alone power to execute an appeal bond in behalf of the district, and that such power could not be exercised by any other person.

Under the law, school districts are simple democracies in which educational matters are managed by the electors themselves, or by a district board composed of the president, secretary and treasurer, if the electors shall so declare. With such an organization it is convenient, if not necessary, to clothe an officer with power to conduct all legal proceedings on behalf of the district, and it is reasonable to presume that the section recited was intended to supply this want. It will be observed that the president is to appear on behalf of the district, that is, as the agent of the district and obviously for the purpose of protecting the interest of his principal. While the president is thus made the agent of the district to attend to its legal controversies, we do not discover in the act any limitation upon the power of the district to act through other agencies. The appointment of the presi-

dent is made to serve the convenience and to protect the interests of the district and not to circumscribe its powers in the matter of choosing its agents. If it be granted that the president has power to appear in behalf of and conduct the causes of the district, *non constat*, that such authority is not possessed by any other person, for a principal may have several agents appointed to do the same thing. The authority of the secretary to execute the appeal bond in this case was denied upon the ground, that such authority could not be conferred upon him, which is not tenable. If he had authority to execute the bond it was binding upon the district, and before appellee could call upon the court to dismiss the appeal, the absence of authority in the secretary must have been shown at least *prima facie*. In some courts a rule obtains which requires that evidence of the authority under which an agent acts shall be filed with the instrument executed by him, but, in the absence of any such rule, courts will not assume that an agent has acted without authority from the principal until a showing is made.

Upon proper application the district court would doubtless require appellant to exhibit the authority under which the secretary acted, or the want of such authority may be shown by affidavit.

But if the bond was executed in good faith it was amendable even if the secretary had no authority from the district to sign it. The statute upon this subject is very liberal, and it applies to every case in which an honest effort is made to appeal the cause. *Patty* v. *Winchester*, 20 Ill. 261.

The judgment is reversed with costs, and the cause is remanded with directions to the district court to permit appellant to file a new bond, according to the prayer of its motion.

Reversed.

1 370
3 286
1 370
19 589

COFIELD v. McCLELLAN et al.

DENVER TOWN SITE — *title to.* When title was acquired to the town site of Denver, under the act of May 28, 1864 (13 Stat. at Large, 94), the prior act of the legislative assembly of the territory (3 Sess. 139), came into effect and governed the trustee in the disposal of lots within the town site.

By the act of congress the regulation of the details of executing the trust was entirely remitted to the territorial legislature, and it was eminently proper that in the very threshhold they should fix a period within which the claim of every beneficiary should be asserted.

TERRITORIAL ACT — *regulating execution of trust.* The provision of the fourth section of the act of the territorial assembly, requiring claimants of land within the town site to assert their claims within ninety days after notice of the entry, was as to claims and rights existing at the date of the entry dictated by public interest and clearly within the power delegated by congress to the territorial legislature.

Every person who, in virtue of an occupancy or improvement existing at the date of the entry of the town site or prior thereto, seeks to bring in question the right of one holding by conveyance from the trustee, must show affirmatively a compliance on his part, with the requirements of the fourth section of the act of assembly, or at least must excuse his failure to comply therewith.

FAILURE TO OBSERVE — *section 4 of act of assembly.* Where a bill was filed against one who had obtained title, under the act of congress and of the territorial assembly, to a lot in the city of Denver, by one who claimed title to the same lot which accrued in the year 1859, to have the defendant declared a trustee for the benefit of the complainant, and it was not averred that the complainant or his grantors had filed a declaratory statement, as required by the fourth section of the act of the assembly, the relief was denied.

Appeal from District Court, Arapahoe County.

Mr. ALFRED SAYRE and Mr. H. R. HUNT, for appellant.

Mr. S. E. BROWNE and Mr. G. W. PURKINS, for appellee.

WELLS, J. The act for the relief of the citizens of Denver, in the territory of Colorado (13 Statute at Large, 94), authorizes the probate judge of Arapahoe county to enter certain specified lands, the site of the city, in trust for the occupants and the *bona fide* owners of improvements thereon, and declares in substance that the execution of the provisions shall be controlled by the provisions of "An act for the

relief of the citizens of towns upon lands of the United States, under certain circumstances," approved May 23, 1844. This latter act (5 Statutes at Large, 657), provides, that, upon the entry, in pursuance of its provisions, of any town site upon the public domain, the execution of the trust for the occupants therein created shall be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or territory within which the same is situated.

In pursuance of this delegation, the legislature of this territory, by the act of March 11, 1864 (Laws 1864, p. 139), had, in advance of the passage of the act of congress for the relief of the citizens of Denver, prescribed rules and regulations for the administration of the trust, in case of the entry thereafter of any town site, in pursuance of the act of congress of May 23, 1844.

There can be little question, we think, that, upon the entry of the town site of Denver (which was made in pursuance of the act of May 28, 1864), the act of the territorial legislature came into application and governed the trustee in the disposal of the lots within the town site; and, in order to the determination of this case, it is necessary, therefore, to refer to the provisions of that act.

By this act, then, it was provided that, in case of the entry of any town site under the act of congress, May 23, 1844, the corporate authorities or the probate judge making such entry should, within thirty days, give notice thereof by posting in three public places within the town, and by publication in a newspaper printed and published within the county; and by the fourth section it was provided, that "each and every person or association, or company of persons claiming to be an occupant or occupants, or to have possession, or to be entitled to the occupancy or possession of such lands, or to any lot, block, share or parcel thereof, shall, within ninety days after the first publication of such notice, in person, or by his, her or their duly authorized agent or attorney, sign a statement in writing containing an accurate description of the particular parcel or parts of land

in which he, she or they claim to have an interest and the specific right, interest or estate therein, which he, she or they claim to be entitled to receive, and deliver the same to or into the office of such corporate authorities, judge or judges; and all persons failing to deliver such statement within the time specified in this section shall be forever barred the right of claiming or recovering such lands or any interest or estate therein, or in any part, parcel or share thereof, in any court of law or equity."

By the act of congress, the regulation of the details of executing the trust was entirely remitted to the territorial legislature, and it was eminently proper that, in the very threshold, they should fix a period within which the claim of every beneficiary, or one pretending to be such, should be asserted; for, in the absence of such a limitation, neither could the trustee understandingly determine at what period he might lawfully perform the trust, and convey to an occupant the lots within his occupancy, nor could any citizen, whether before or after such conveyance, at no matter how remote a period, be confident that his title might not be clouded by assertion of an adverse claim. To have omitted such legislation would have been to encourage the prosecution, in later years, of dormant claims and possessory rights long before abandoned, and to render doubtful and uncertain all titles accruing under the trust. Such a regulation as that contained in the fourth section before quoted was, therefore, as to claims and possessory rights, existing at the date of the entry, dictated by public interest, and as to those claims and rights, was clearly within the power delegated by congress to the territorial legislature. Whether any several beneficial interests in the trust could, under any circumstances, arise subsequent to the entry, is a question upon which I have heretofore expressed my opinion in *The City of Denver* v. *Kent et al.*, *ante*, 336, decided at the present term, and the effect of this legislation upon rights not acquired or asserted to be acquired, until after the date of the entry, it is not necessary in this cause to advert to.

And, though the period fixed within which those claiming

to be entitled to share in the trust may appear to be a more limited one than a liberal policy might have dictated, yet we cannot, for this reason, declare the statute invalid; for this, like all other questions of mere detail, was exclusively within the legislative discretion.

We are of opinion, therefore, that every person who, in virtue of an occupancy or improvement existing at the date of the entry of the town site, or prior thereto, seeks to bring in question the right of one holding by conveyance from the trustee, must show affirmatively a compliance on his part with the requirements of the fourth section of the act of the territorial legislature of March 11, 1864, or at least must excuse his failure to comply therewith. As to what state of circumstances will amount to such excuse, or whether any circumstances whatever will excuse such omission, is a question not presented by this record, and upon which, therefore, we express no opinion.

Now, in this case, the entry of the town site was made on the 6th day of May, A. D. 1865, and though there is no proof that notices of the entry were posted, as required by the act, yet we think that, in support of the subsequent proceedings of the probate judge, we ought to indulge the presumption that he performed what the law required of him in this respect. On the 11th day of August, A. D. 1865, the probate judge conveyed the premises in controversy to the defendant Louisa Mc Clellan, who subsequently conveyed to the defendant Mary Davis.

The complainant now seeks to have this defendant declared a trustee, for his benefit, on the strength of a prior occupancy and improvement of the premises by one Preston, under whom he claims. It is averred that Preston erected a cabin upon the premises in the year 1859, and in the same year conveyed to one Hall, who, by tenants, occupied the cabin, at different times, down to about the year 1862; in October, 1866, Hall conveyed to Felter, and subsequently Felter to Bates, and Bates to the complainant; in April, 1869, Felter, Bates and the complainant being, at the date

of the several conveyances to them, respectively residents of the city of Denver.

The bill which was filed on the 22d day of April, 1869, nowhere avers that Hall ever presented to the probate judge his declaratory statement required by the fourth section of the act of March 11, 1864; nor is any excuse shown for his omission so to do, or for the long delay of the complainant and those under whom he claims to assert their right.

The complainant is, therefore, not entitled to the relief prayed, and the decree of the district court dismissing the bill must be affirmed.

Affirmed.

---

1 374
6 221
1 374
13 478
1 374
17 397
1 374
1a 434

CLEAR CREEK, COLORADO, GOLD AND SILVER MINING COMPANY et al. v. ROOT et al.

PRACTICE — *assigning errors.* Errors should be assigned with such particularity as to give information of the objections to the record upon which the plaintiff intends to rely.

PRACTICE *in cases of mechanic's lien.* In cases arising under the act relating to mechanic's liens (Rev. Stat., ch. 54, 427) the chancery practice is to be observed.

PRACTICE — *evidence to support bill confessed.* Upon bill confessed, the court may proceed to a decree, with or without evidence, to support the bill, and this rule is applicable to lien cases.

INTEREST *on demand secured by lien.* A debtor may agree to pay interest on a demand secured by mechanic's lien as well as upon any other, and, whatever its effect among creditors, the debtor cannot object to pay the interest.

PLEADING AND PROOF — *decree must not exceed demand in bill.* A decree cannot be entered for more than is claimed in the bill.

SERVICE BY PUBLICATION — *what evidence sufficient.* Where the decree recites this there was notice by publication, and the record is not complete, the decree will not be reversed because the certificate of publication is not found in the record.

TIME TO REDEEM — *discretionary.* Where the court has allowed ninety days before sale in which the premises may be redeemed, the decree will not be disturbed on that account.

Error to District Court, Clear Creek County.

Mr. L. C. ROCKWELL, for plaintiff in error.

Mr. WILLARD TELLER, for defendant in error.

HALLETT, C. J. The sufficiency of the petition, and the extent of the premises subjected to the lien, are not questioned by the assignment of errors, and although allusion has been made to those questions in the argument, we shall not consider them. The first, second and third causes of error are upon the sufficiency or the want of evidence to support the decree. The fourth cause appeals to the service of process, and the sixth to the time allowed for payment of the sums found due. The only assignment upon which other objections to the record can be founded, is the fifth, and this is substantially *quod in omnibus erratum est*, and bad according to Bacon's Abridgment.

To say that the decree is contrary to law, equity and good conscience, without specifying in what particular, serves no practical purpose. The plaintiff in error might as well refuse to state his objection as state it in such general terms, and, if such practice were allowed, defendants in error would never know, in advance of the argument, what points were in issue. Errors should be assigned with such particularity as to give information of the objections to the record upon which the plaintiff intends to rely.

By the twenty-third section of the chapter of the Revised Statutes relating to liens, it is provided, that in proceedings under the act courts are vested with all the powers of courts of chancery, and shall be governed by the rules of proceeding and decision in those courts, so far as those rules of proceeding and decision are applicable to cases and questions presented for adjudication and decision under the act.

With propriety, this has been regarded as establishing the chancery practice in cases of this kind, subject, of course, to such modifications as are provided by the act relating to liens. *Sutherland et al.* v. *Ryerson et al.*, 24 Ill. 517.

The nineteenth section of the act relating to chancery

practice has been held to confer upon the court power to proceed to a decree, upon bill confessed, with or without evidence to support the bill, as the court shall, in its discretion, deem best. *Stevens* v. *Bicknell*, 27 Ill. 444.

It is contended that a different rule should be applied to lien cases, but we do not discover any ground for doing so. The rule in question is quite as applicable to this proceeding as any other rule of chancery practice, and it is therefore precisely within the terms of section 23 of the act relating to liens. The bill in this case having been taken as confessed by plaintiffs in error, the want of evidence to support it is no ground for reversal.

Another question arises as to the amounts of money awarded to defendants in error respectively by the court below, which, it is said, exceed the demands of the bill. It appears that a portion of Root's demand was secured by promissory note, bearing interest at the rate of two per cent per month after maturity, and as this contract for interest was within the provisions of the statute upon that subject, we see no objection to its allowance. Surely a debtor may agree to pay interest upon a demand secured by mechanics' lien as well as upon any other.

Perhaps a question might arise among creditors or subsequent incumbrancers as to the effect of an agreement by the debtor to pay interest, by which the demand of one creditor would be increased to the prejudice of another. But no such question is presented in this case, as we are confident that the debtor himself cannot rely upon such an objection. It may be well to notice, in this connection, that the Franklin Silver Mining Company, one of the plaintiffs in error, has not disclosed any connection with the property mentioned in the bill, or shown any right to complain of the amount of the demands of defendants in error. We do not perceive that the amount adjudged to Root exceeds the claim made by the bill, for it is no more than the note with interest, and the account which was not included in the note added. But Waterman claims in the bill $168.42, and the decree in his favor is for $192. There was no agreement to pay interest

to him, nor was there any settlement of the account upon which such an agreement could have been implied. In so far, then, as the decree exceeds the demand stated in the bill it is erroneous and must be modified.

The next question in the order in which they are presented by the assignment of errors relates to the service of process, which, we think, was not deficient, or, at all events, no deficiency was shown. The Franklin Company appeared voluntarily in the court below, and, as to the other, the decree shows that there was notice by publication. Perhaps this would not be sufficient, without the certificate of publication itself, if the record was full and complete. But the certificate of the clerk does not show this to be a full and complete record, and we will, therefore, presume that the court below acted upon sufficient evidence of the notice by publication.

As to the last point, it was within the discretion of the court to fix the time for the payment of the sums found due to defendants in error, although it has been held that the time ought not to be less than the life of an execution upon a judgment at law. This period was allowed in this case, and there appears to be no reason for questioning the correctness of the decree in this respect.

The decree is reversed, with costs, and the cause is remanded, with directions to the court below to enter a decree according to the views here expressed.

Reversed.

CODY v. BUTTERFIELD.

1	377
2	290
3	31
3	87
3	252
3	269
5	39
6	155
1	377
22	238

CONTINUANCE *to obtain testimony of absent witnesses.* A party seeking a continuance to obtain the testimony of absent witnesses must, in his affidavit, set forth the facts to be proven with such particularity that the opposite party may, if he see fit, admit them and proceed to trial.

Action upon a promissory note; defense, that note was given for the carriage of certain goods which were damaged *in transitu* through the negligence and carelessness of the carrier. Affidavit for continuance to obtain testi-

mony of absent witnesses did not set forth to what extent the goods were injured, nor that the defendant could show, by these or other witnesses, the amount of the damage occasioned by the alleged negligence of the plaintiff, nor what the amount of this damage was. *Held*, that the continuance was properly denied.

The party seeking a continuance ought to make it appear affirmatively to the court, not only that, upon a possible or supposable state of facts, the testimony may become important, but that, upon the facts as they are, it is and will be so.

CONTINUANCE — *diligence in obtaining depositions.* Where the issues were made up in February, 1868, and application for continuance in June, 1869, and the defendant made no effort to obtain the testimony of absent witnesses until some three months before the sitting of the court, there was not sufficient diligence.

The matter of diligence in obtaining testimony discussed.

PRACTICE — *ground of objection to testimony should be stated.* If the nature of an objection to testimony is such that, by the production of further testimony, the evidence objected to is susceptible of being made admissible, the particular ground of objection must be stated, and, if it is not stated, a court of review ought to regard the evidence as properly admitted.

In an action upon a promissory note against a woman, it appeared that she was married previous to the execution of the note, and it did not appear that the note was executed in or about the sole trade or business of defendant, or in relation to her separate estate; and it was urged in this court that, upon these facts, a presumption arises that the marriage existed at the time of the execution of the note, and that the burden of showing that the note was given in relation to the separate business or estate rested upon the plaintiff. These objections, not having been made in the court below, cannot be urged here.

EVIDENCE OF PAROL ASSIGNMENT *in action by one to use of others.* In an action upon a promissory note, brought by one for the use of others, it is not necessary at the trial to prove a parol assignment of the note to the persons to whose use the suit is prosecuted.

Appeal from District Court, Gilpin County.

Messrs. JOHNSON & TELLER, for appellant.

Mr. HUGH BUTLER, for appellee.

WELLS, J. This was an action of assumpsit commenced in the Arapahoe district court; the venue was afterward changed to the Gilpin district court, where a trial was had and judgment given for the plaintiff.

The plaintiff below, in several counts, declared upon a promissory note, purporting to have been executed to him

by the defendant by one Elijah Cody, her agent. The defendant pleaded the general issue, without verification and payment post diem. The cause was put at issue on the 20th day of February, A. D. 1868.

On the 3d day of June, A. D. 1869, and at the May term in that year of the Gilpin district court, the defendant moved for a continuance, upon her own affidavit of the absence of certain witnesses, the material portions of which are hereafter set forth; this motion the court overruled.

On the trial the plaintiff produced a note corresponding to that described in the declaration, and proved that the signature thereto was in the handwriting of Elijah Cody. That, from 1861 to 1866, Elijah Cody resided in Denver, and was the agent of plaintiff, who was engaged in the sale of millinery and dry goods; that, in 1865, defendant had accounts with different banking houses in Denver; that Elijah Cody generally made the deposits which went to the credit of these accounts, and defendant generally checked against them; that Elijah Cody attended to defendant's affairs during the periods of her absence, when engaged in the purchase of goods, that he was about defendant's store both then and at other times; one witness spoke of this relation of the parties as existing from 1861 to 1866, and upon cross-examination, testified that Elijah Cody was the husband of defendant (though at what time, was not expressly stated), and that they resided together. It was further proven that Elijah Cody died at some time prior to the trial, though the date of his decease was not shown.

Upon this evidence, the defendant prayed instructions, substantially as follows: 1st. There is not sufficient evidence in the case to enable plaintiff to recover. 2d. There is no evidence that any of the plaintiffs for whose use this suit is brought have any interest in the note offered in evidence, and unless such interest is shown, they cannot recover in this action. 3d. If defendant, at the time of giving the note offered in evidence, was a married woman, the plaintiffs ought to have sued her husband with her, and unless the jury believe, from the evidence, that her husband

was dead at the time of the bringing of this suit, they must find for defendant.

All the instructions were refused; a verdict was found for the plaintiff and judgment given thereon.

Appellant now assigns for error, among other things: 1st. That the court overruled her motion for a continuance. 2d. That the court erred in refusing the instructions prayed by her counsel. 3d. That the verdict is against the evidence and the damages excessive. 4th. That the court gave judgment upon the verdict, and such judgment is against the law and evidence.

We think the defendant's motion for a continuance was properly overruled.

The affidavit, upon which this application was based sets forth, that defendant could not safely proceed to a trial, on account of the absence of two witnesses named; that she expected to prove by said witnesses that the claim sued on in this case was for a sum of money alleged to be due for freight upon certain goods freighted by plaintiffs for defendant; that the witnesses were present at the time the goods were received and assisted in unpacking them and observed their condition, and that said goods were badly damaged by having become wet, and by rough and improper handling on the part of said plaintiffs and their employees, and that defendant had no other witness, etc.

We think the facts intended to be proven by the absent witnesses were not set forth with sufficient particularity; the rule is, that the party seeking a continuance for the absence of testimony must, in his affidavit, set forth the facts to be proven with such particularity that the opposite party may, if he see fit, admit them and proceed to trial. *McBain* v. *Enloe*, 13 Ill. 76.

This is an alternative to which the opposite party is entitled, and he ought to have precise information as to the matters upon which he is to make his election.

Now, in the affidavit, it is not alleged to what extent the goods were injured, nor that defendants could show, by these or other witnesses, the amount of the damages occa-

sioned by the alleged negligence of the plaintiff, nor what the amount of this damage in fact was, but the only allegation is, that the goods were "badly damaged," and if the witnesses had been present, testifying to this and every other fact set forth in the affidavit as to be proven by them, their testimony, of itself, and without other facts shown, could not have either barred the action or mitigated the damages. Not only would it not have been material, but, upon motion, must have been stricken out.

It may be said that the testimony of the particular witness is none the less material to defendant's case, because not sufficient to establish it as a whole; but it was said in *Baily* v. *Hardy*, 12 Ill. 459, that "where testimony is important only in connection with certain facts, those facts should be set forth or referred to, so that the materiality of the evidence may be apparent to the court. The court is not to presume that a state of facts may arise which may render the testimony important."

We think this decision ought to be adhered to in our courts; the party seeking a continuance ought to make it appear affirmatively to the court not only that, upon a possible or supposable state of facts, the testimony may become important, but that, upon the facts as they are, it is and will be so.

Upon the question whether the affidavit shows diligence in the efforts made to procure the testimony of these witnesses, we are of the opinion that it does not. The pleadings in this case were brought to an issue on the 29th day of February, 1868. This application for a continuance was interposed on the 10th day of June, A. D. 1869. The affidavit shows that Welch, one of the witnesses, resided at Salt Lake City, in the the territory of Utah, and had resided there for several months then last past; that in February, previous to her making application for continuance, defendant furnished her counsel with the facts to be proven by him and his place of residence; that, as early as April, a comission issued to a commissioner in Salt Lake city to take the deposition of Welch; that said commission was indorsed

with the request that, if not called for in ten days, it might be returned to defendant's attorneys; that the deposition had not been returned to the court nor to defendant's attorneys, and that she expected to procure the attendance of Welch, or his deposition, at the next term of the court; that the other witness, Mrs. Anderson Orr, then resided at Council Bluffs, in the State of Iowa; that she had formerly resided at Central City, Colorado; that deponent went east in February preceding; that Mrs. Orr was then still a resident of Central City; that deponent had returned from her absence only a few weeks previous to making her affidavit, and had obtained no knowledge of Mrs. Orr's departure until within a few days; that, at the time of defendant's departure for the east, she had no knowledge of any intention on the part of Mrs. Orr to leave the territory, and that sufficient time had not elapsed, since hearing of her departure, to procure her deposition.

We think as to neither of these witnesses was there such a degree of diligence shown as ought to be exerted in a case so long pending and at issue as this had been.

The witness Welch had resided in Utah for several months, and, for any thing that appears, he may have resided there at the time of the commencement of this suit, and always afterward, the defendant being at the time aware of his place of residence; and if, with this cause pending and at issue, she saw fit to defer preparation until within some three months of the sitting of the court and to assume in the mean time the risk of the witnesses' removal or temporary absence, and the delays and uncertainties of communication, she ought now to endure the event with the same equanimity with which, in this game against fortune, she accepted the hazard. Nor was it diligence after this long delay to rest until June in reliance upon the one commission issued in April; after the lapse of a reasonable time for the return of the commission some effort ought to have been put forth to ascertain its whereabouts or to procure another.

As to the witness, Mrs. Orr, there is no sufficient excuse

shown, we think, for the omission to serve her with a subpœna, nor is it anywhere alleged that the defendant expected to procure her testimony at any time in the future.

Under the remaining assignments of error it is insisted by counsel that it is shown that defendant was, at some time prior to the trial, a married woman; that, by fair inference upon the testimony, the coverture existed at the time of making the note upon which recovery was had; that the note sued upon was not shown to have been executed in or about the sole trade or business of defendant or in relation to her separate estate; that the statute has repealed the common law only in relation to those contracts, into which the married woman is expressly permitted to enter; that the burden of establishing that in the execution of the note in question, the defendant was acting within the statute rested upon the plaintiff; that this was not established and that therefore the judgment is not supported by the evidence.

We apprehend that the propositions of law maintained by counsel are supported by authority, and certainly they rest upon the soundest reasons; but we think that, admitting the effect of the testimony to be as contended, the defendant cannot now be heard to make these objections: 1st. The plaintiff declared specially upon the writing offered in evidence and under which the recovery was had and the defendant's plea was not verified. The statute of this territory provides that no person shall be permitted to deny on trial the execution of any instrument of writing, whether sealed or not, upon which any action may have been brought, unless the person denying the same shall, if defendant, verifiy his plea by affidavit. R. S., ch. 70, § 14.

I understand that under this statute a defendant, sued upon a written instrument, must swear his plea, not only in cases where he proposes to deny the mere act of subscribing the instrument, but also in cases where, while the subscription in fact is admitted, it is proposed to assert that for any reason the writing was not the act of the party in such sense as to be a binding and obligatory contract; as, for example, where the defense is that at the time of subscribing the in-

strument the defendant was drunk or insane, or *non compos*, or that he was imposed upon, and subscribed under the belief and understanding that the instrument was other and different from what it in fact was, or that the instrument was never delivered, or that for any other reason the defendant did not assent to the instrument in such sense as to execute it within the meaning of the law.

When the legislature adopt technical words in prescribing rules of practice for courts of record, their language must, I apprehend, be received in a technical sense; the word "execution," in the statute, must be understood, therefore, as meaning, not the mere subscription of the parties' name, but the subscription of the name to the instrument, with a knowledge of its contents; or with such opportunity and deliberation that the law implies knowledge, with intent to be bound thereby, and with capacity to exercise that intent; nothing less than this is, in law, an execution of an instrument in writing; and if the party sought to be charged proposes to assert that, for the absence of any of these elements, the instrument is not his act, he must verify his plea; in these positions, however, the other members of the court disagree with me.

Second: The bill of exceptions shows that, after the reception of the parol testimony recited in this opinion, the plaintiff below offered to read to the jury the promissory note, about which the witnesses had testified, and that the defendant objected thereto; but it nowhere appears what ground or reason was assigned for this objection, or that any reason whatever was assigned.

If the objection, which is now alleged against the sufficiency of the evidence, had been then stated, the plaintiff's counsel might have, perhaps, supplemented the alleged deficiencies in the proofs; opportunity would have, at least, been afforded to produce the evidence, for the absence of which error is now assigned; and if the defendant desired to insist that the proper preliminary proofs had not been made, it was her duty to have then asserted it.

When, upon trial, objection is made to the admission of

testimony, and the nature of the objection is such that, by the production of further testimony, the evidence objected to is susceptible of being made admissible, the particular ground of objection must be stated, and if it is not stated, a court of review ought to regard the evidence as properly admitted. We are all of the opinion, therefore, that the promissory note offered in evidence upon the trial was, for the reason last mentioned, properly admitted, and the defendant cannot be heard to say, in this court, that the person assuming to act as her agent was not lawfully authorized, or that it was not shown to have been executed in a case within her legal capacity, or that, for any other reason, the proofs connecting her with the instrument were insufficient.

We see no error in the assessment of damages, nor in the omission to prove the parol transfer of the note to the beneficiaries named in the declaration; it need not have been alleged; and being unnecessary to allege, is certainly not necessary to be proven.

The judgment of the district court is affirmed, with costs.

Affirmed.

WATSON *v.* HAHN.

MEASURE OF DAMAGES — *on promissory note.* In action against indorser of a promissory note, judgment having been obtained against the maker, the amount of the judgment, with interest, is the measure of damages unless the indorser show that the recovery was wrongful.

EVIDENCE — *by parol of contents of record.* Parol evidence is not admissible to prove the amount of a judgment or the cause of action upon which it was recovered. The record or a transcript therefrom must be produced.

WITHDRAWING DEMURRER — *what shall be regarded as.* If, upon overruling demurrer to declaration, an order is made at the instance of the plaintiff requiring the defendant to plead, although the defendant fail to object, he shall not be regarded as withdrawing his demurrer and submitting to the rule.

JUDGMENT UPON DEMURRER — *sufficiency.* Where two demurrers to the declaration were on file, and the judgment of the court refers to the said de-

murrer, without specifying which of them, it will be presumed that the court passed upon both of them.

A judgment upon demurrer that the same be overruled, although informal, will be sustained.

COMMON-LAW FORMS — *should be observed.* The common-law forms of entries cannot be abandoned without danger to the rights of parties and it is much to be regretted that clerks are not more familiar with them.

WAIVER — *of joinder in demurrer.* If a party proceed to argue a demurrer without joining in demurrer, he cannot complain of the omission.

ASSIGNOR OF PROMISSORY NOTE — *liability of.* To charge the assignor of a note suit must be instituted against the maker, at the first term of any court having jurisdiction of the amount, and prosecuted with reasonable diligence to judgment, and the property of the maker, so far as found, must be subjected to the judgment.

Under the statute of this territory the assignor of a promissory note cannot be made liable to the assignee upon notice of dishonor by the maker merely.

DILIGENCE — *in prosecuting maker of the note.* If the holder of a note obtain judgment by confession of the maker, soon after the maturity of the note, and stay execution thereof, the court will not consider whether execution was obtained as soon as it could have been obtained in the due course of law. In such case the stay of execution is made at the peril of him who grants it.

Delay of seventy days after judgment in obtaining execution is not due diligence.

DILIGENCE AGAINST MAKER — *what will discharge assignor.* Lack of diligence in prosecuting the maker of a note will not discharge the assignor, unless it has been prejudicial to him.

As a judgment is a lien upon real estate for one year after rendition, and longer, if execution is obtained within the year, execution issued seventy days after judgment may be sufficient to secure the real estate of the maker.

But execution is necessary to secure the personal property of the maker, and if there was delay in issuing execution, in order to show that such delay was not prejudicial to the assignor, it should be averred that all the personalty of the maker was ultimately secured, or that he had no such estate at the time judgment was entered.

Appeal from District Court, Gilpin County.

L. C. ROCKWELL, for appellant.

S. B. HAHN, *pro se.*

HALLETT, C. J. There are five special counts in the declaration and the common counts. A demurrer to the special counts was confessed by appellee as to the first

count, and by leave of court he amended that count and filed another special count, which I shall call the sixth. A demurrer was interposed to the first count as amended, and the sixth count, and subsequently the first demurrer, remaining undetermined as to the second, third, fourth and fifth counts, and this last demurrer pending, the court made the following order:

"At this day came the said parties by their attorneys aforesaid, and the demurrer of the said defendant to plaintiff's declaration coming on to be heard, was argued by counsel, and the court being fully advised in the matter, and mature deliberation thereon had, is of the opinion that the said demurrer be overruled. Thereupon, on motion of plaintiff, it is ordered by the court that the defendant in this cause plead by the first day of February next."

At the next term of the court, which occurred after the time limited in this order for pleading, no plea having been filed, appellee discontinued his action upon the common counts and took judgment *nil dicit* upon the special count, and the damages were assessed by a jury in open court. Upon the assessment of damages, appellant took a bill of exceptions which contains the testimony given upon that occasion, and upon another day of the term he moved to set aside the assessment of damages, but the court refused to do it, and he excepted.

Error has been assigned upon this refusal of the court to set aside the assessment of damages, and we think that appellant has the right to be heard in this court upon that point. *Chicago & R. I. R. Co.* v. *Ward*, 16 Ill. 522.

In explanation of the evidence given upon the assessment of damages, it is necessary to remark that, in the first and second counts of the declaration, appellant is charged as indorser of a promissory note, and it is averred that judgment was obtained upon the note by appellee against the maker. Upon the hearing before the jury, a witness testified that he had computed the amount due upon the judgment mentioned in the declaration and found it to be $1,672.84, which is the amount for which the jury returned

their verdict. This was all the evidence before the jury, and as there is no other judgment mentioned in the declaration than that obtained by appellee against the maker of the note, the evidence must be taken as referring to that judgment. It is laid down in *Corgan* v. *Frew*, 39 Ill. 31, that, in an action against the indorser of a note, judgment having been obtained against the maker, the measure of damages is the amount of the judgment against the maker, and the accruing interest and the costs if unpaid. And this must be the correct rule, for the note being merged in the judgment, at least so far as the maker is concerned, the assignor can have no remedy over against the maker unless he be subrogated to the rights of the assignee in the judgment. Again, if the maker should reduce the recovery against him by set-off, payment or otherwise, the assignor ought to have the benefit of such reduction. As, however, the assignor is not a party to the suit between the assignee and maker, it may be difficult to say that he would at all events be bound by the recovery in that suit. But it will be sufficient for our present purpose to say that the judgment against the maker, with interest, will furnish the amount of damages unless the assignor shows that the recovery was wrongful, leaving the question of his right to contest the amount of the judgment to be determined when it is presented. But if the amount of the judgment against the maker, less the payments made upon it, is the measure of damages, it certainly cannot be established by parol testimony. The rule which requires the best evidence to be produced makes it necessary to produce the record of the judgment or a transcript from the record, not only for the purpose of showing the amount of the judgment, but also that the judgment was in fact recovered upon the promissory note, which is the foundation of the action against the assignor. We think, therefore, that there was error in the assessment of the damages, and the judgment must be reversed for that reason.

And this makes it necessary to examine the whole record, for, while it is true that, if we could maintain this judg-

ment upon any count of the declaration, we should be relieved from consideration of the other counts, yet, as we have not been able to sustain the judgment, we must look into the ruling of the court upon the demurrer, which leads to an examination of the whole declaration. A preliminary question is, however, presented as to the effect of the order upon appellant to plead, made at the time the demurrers were overruled. It is said that appellant submitted to this order or assented to it, and, in so doing, waived his demurrers to the declaration. It is well settled that, if a party plead after his demurrer is overruled, he thereby waives his demurrer, and cannot afterward rely upon it. And probably cases may be found in which it has been held that the same result is attained by a formal application on the part of the demurrant for leave to plead after his demurrer has been passed upon. But it will be observed that in this case the order to plead was made at the instance of appellee. And although appellant was present, and it does not appear that he objected to the order, we think that this is not sufficient to show an intention on his part to abandon his demurrer. To change the character of the defense and substitute an issue of fact for one of law required some act or word on the part of appellant indicative of his intention to make such change. When the order was made he could have done no more than protest against it, and record his protest in the form of a bill of exceptions. To hold that he must have done this in order to prevent the inference that he assented to the order would be to say that he must have protested against any change of the issue, in order to maintain it as it was. This would be preposterous. When a party has taken issue upon a declaration he must be allowed to maintain it until he voluntarily abandons it. Another preliminary question arises upon the form and language of the order of the court above recited. It cannot be contended that this is a formal judgment upon demurrer, and yet we think that, in support of the proceedings of a court of general jurisdiction, we must give it the effect of such a judgment. There is sufficient in the order to show that the court

passed upon a demurrer, and as it was the duty of counsel to submit all issues proper for the consideration of the court, and then ripe for hearing, we must presume that this was done. Indeed, as the order contains no reference to either demurrer specifically, we must apply it to both of them, in order to give effect to it. The common-law forms of entries cannot be abandoned without danger to the rights of parties, and it is much to be regretted that clerks of courts are not more familiar with them. It is hoped that counsel and judges of courts of original jurisdiction will make an effort to relieve us of the perplexities, often recurring, of such records as this.

Upon the point that there was no joinder in demurrer, we have only to say that appellant, having submitted the demurrers to the court, cannot now complain of the omission. *Parker* v. *Palmer*, 22 Ill. 489. From these questions of practice we pass to the weightier matter of the law governing appellant's liability as assignor of a promissory note. In the seventh section of the act relating to bills of exchange and promissory notes, it is provided that the assignor of a note shall be liable upon it, if the assignee, by suit against the maker, shall use diligence in collecting it, but such diligence is excused, if at the maturity of the paper it would be unavailing. This statute was borrowed from the State of Illinois, in which State it has received judicial interpretation.

In Indiana, also, the maker of a note must be prosecuted to insolvency before recourse can be had to the indorser, and there are many valuable decisions in the reports of that State upon points arising under our statute. It seems that in order to charge the assignor of a note, suit must be instituted against the maker at the first term of any court having jurisdiction of the amount and prosecuted with reasonable diligence to judgment, and the property of the maker, so far as found, must be subjected to the payment of the judgment. *Bestor* v. *Walker*, 4 Gil. 3; *Nixon* v. *Weyhrich*, 20 Ill. 600.

In this case the note became due on the 8th of March and on the 22d of that month, and before any term of court in which judgment could have been obtained, Eman-

uel, the maker of the note, confessed judgment upon it in the district court of Gilpin county, in favor of appellee. In the first count of the declaration it is alleged that, by agreement with Emanuel, execution of the judgment was staid until the first day of June, after the judgment was entered, and in both the first and second counts it appears that execution was not in fact issued until that day.

No laches can be imputed to appellee in respect to the time in which judgment was obtained, but the question arises whether there was diligence in obtaining execution of the judgment. And upon this point it can make no difference whether execution was staid by agreement with Emanuel or not. Appellee was not bound to accept the terms upon which Emanuel confessed judgment. He was at liberty to commence suit in the ordinary way, and if he prosecuted his suit diligently he could not be prejudiced by the laws delay. Nor can we enter into a calculation of chances to ascertain whether execution was obtained as soon as it might have been obtained in the ordinary course of proceeding. We have no means of determining such a question, and if we had, the statute gives no authority for doing it. The statute enjoined diligence in the prosecution of the suit, and if appellee granted a stay of execution, he did so at his peril. In *Rives* v. *Kumber*, 27 Ill. 291, a delay of sixty days in issuing execution upon a judgment against the maker of a note was held sufficient, if unexplained, to discharge the assignor. In *Spears* v. *Clark*, 7 Blackf. 283, a delay of thirty days was attended with the same result. Upon subsequent proceedings in this cause, however, it appeared that the *fi. fa.* was issued within fourteen days from the adjournment of the court in which judgment was obtained; this was regarded as sufficient diligence. *Spears* v. *Clark*, 3 Ind. 297. In this opinion the Indiana authorities are reviewed, and it seems that a delay of thirty days, after the adjournment of the court, in issuing execution against the maker of a note has not been sanctioned in that State. In the case at bar, as we have seen, execution was delayed from March 22d to June 1st, a period of seventy days, and this,

according to the authorities cited, is not due diligence. But lack of diligence on the part of the assignee does not discharge the assignor unless it has been prejudicial to him. The statute requires diligence for the purpose of subjecting the property of the maker to the payment of the note, and if this is accomplished the assignor cannot complain that it was not done as speedily as possible. To this effect are the cases cited, and all others that we have seen, and this is the spirit and intent of the law. As we have seen, judgment was obtained against Emanuel, the maker of the note, in due time, and from the time it was entered by a law of the territory it became a lien upon his real estate, for one year at least, and longer if execution should be issued within one year. Therefore, execution issued seventy days after the judgment was entered was as effectual to secure the real estate of Emanuel as if issued at an earlier day. Upon this point we refer to what is said *arguendo* in *Bank U. S.* v. *Tyler*, 4 Peters, 366.

Therefore, as to the real property of Emanuel, delay in execution could not work injury to appellant. Not so, however, as to the personal estate. To secure that an execution was necessary, and to excuse the delay in issuing it, or rather to show that such delay was not prejudicial to appellant, the declaration should show that all the personalty of Emanuel was ultimately secured, or that he had no such estate at the time judgment was obtained. In this respect the first count is defective. It is averred that Emanuel neither owned or possessed any personal property "liable to be taken in execution," but the pleader neglected to state the time to which this allegation refers. The averment, "that he obtained judgment as aforesaid against said Emanuel, at the earliest time in his power, thereby securing all the property of said Emanuel in said county," is argumentative and otherwise obnoxious to the rules of good pleading.

In the second count it is alleged "that the said Emanuel never had any goods or chattels liable to be taken in execution after the maturity of said note," and this, we think, is substantially good. As we have seen, the judgment, with

the executions issued upon it, was sufficient to subject the real property of Emanuel to the payment of the note, and if he had no personal estate the greatest diligence must have been fruitless. While, therefore, we think that the demurrer ought to have been sustained to the first count, we support the ruling of the district court as to the second, and this we infer, from the tenor of the discussion at the bar, is sufficient to determine the rights of these parties. Before passing from these counts we wish to say that, if appellant desired to object to the immaterial matter incorporated in them, there could be no objection to his doing so; but to bring the matter properly before the court he should, in framing his demurrer, have avoided the faults of his adversary.

In the third and fourth counts of the declaration appellee relied upon a promise made in consideration of forbearance to sue. We have given no attention to these counts, as they do not appear to have been relied upon. The fifth count charges liability as indorser, according to the *lex mercatoria* as it exists in some of the States, by which an indorser becomes liable upon notice of dishonor by the maker. It is hardly necessary to say that under our statute no such liability exists. The sixth count is framed upon that clause of the statute which relieves the assignee from pursuing the maker of a note, when such pursuit would be unavailing. As it conforms to the statute, we do not perceive any objection to it. Our conclusion is, that the district court erred in overruling the demurrer to the first and fifth counts, and for this and the error in assessing damages the judgment must be reversed with costs, and the cause remanded.

Reversed.

LEIS *v.* HODGSON.

COSTS — *not allowed when amount due has been tendered before suit.* Where the jury find that, before suit brought, the amount found to be due the plaintiff was tendered to him, he cannot recover costs.

Error to District Court, Weld County.

Messrs. BROWNE & MECHLING, for plaintiff in error.

Mr. E. L. SMITH, for defendant in error.

Per CURIAM. This was an action in trespass for killing sheep. The trial was had by jury, who found verdict for the plaintiff for the sum of $10, and further found, that, before the bringing of the suit, the defendant had tendered to the plaintiff the sum of $10, in payment of the damages done by him. On this verdict the court entered judgment for the plaintiff for the sum of $10, together with his costs, charges, etc. This judgment, so far as it relates to costs, cannot be sustained.

Section 32, Revised Statutes of Colorado, p. 511, provides: "In all cases where a tender shall be made, and full payment offered, * * and the party to whom such tender shall be made doth refuse the same, and yet, afterward, will sue for the debt or goods so tendered, he shall not recover any costs." It is claimed by the appellee, inasmuch as no motion was made for a new trial before the writ of error was sued out, this court cannot review the judgment. There is nothing in this point. The verdict was regular. A motion for a new trial precedes the entering of the judgment, and cannot well follow it. Besides, there would be nothing to require a new trial. The error is not in the trial, but in the character of the judgment. This cause is remanded, with directions to the court below to vacate so much of said judgment as assesses costs against the defendant below. It is ordered that the appellee pay the cost.

Reversed.

TIGER v. LINCOLN et al.

NEW TRIAL — *sufficiency of evidence to support finding.* In determining the relative credit to be given to the testimony of conflicting witnesses, so much consideration is due to the manner and bearing of each under exam

ination, and their apparent intelligence and candor, or prejudice, that a court of review, to which all these things are hidden, ought not lightly to reject the opinion of either court or jury, before whom the witnesses for both parties have been subjected to examination and cross-examination.

Where a witness for the plaintiff testified that the defendant purchased goods of the plaintiff, and the defendant denied that he had made such purchase, and the court found the issue for the plaintiff, such finding will not be set aside for insufficient testimony.

Where, however, the finding is unsupported as to a portion of the damages assessed, the judgment will be reversed and the cause remanded, with directions to the court below to enter judgment for the proper sum.

AGENT — *who is charged as principal must show previous authority.* In an action against T. to recover the price and value of certain goods alleged to have been purchased by him, the defendant alleged that he purchased the goods for B., and as his agent; but there was nothing to show that B. had given to T. authority to purchase such goods. *Held*, that the defense was not made out.

NONJOINDER *of defendants must be pleaded in abatement.* Nonjoinder of defendants is never a bar but only matter in abatement.

RELEASE OF DEFENDANT *by accepting third party.* In an action for the price and value of goods, the defendant alleged that he purchased the goods as agent for B., and it appeared that some time after the purchase was made plaintiffs rendered an account to B. in which he was charged with the balance of defendant's bill, for which action was brought. There being no evidence to show that plaintiffs agreed to accept B. as their debtor, or that B. agreed to pay the debt, the defendant was not thereby discharged.

Appeal from Probate Court, Arapahoe County.

AT the trial Alonzo Huxley testified: That he was present at a conversation between the defendant and Mahar, at what is now the place of business of Strickler and Mahar, formerly Lincoln & Strickler. The conversation was in relation to a bill of goods. He, the defendant, admitted the buying of $473 worth of goods on his personal account.

On cross-examination the witness stated: The defendant did not claim that he had paid any part of the money on these goods, nor that any thing had been paid on them. He claimed that he paid $200 on account of Bigelow, or on the Bigelow account. What his statements were I do not remember; I could not swear that he did, or did not, claim that the goods were sold to Bigelow. He claimed that the amount due was the debt of Bigelow; He admitted he had

an account there; He claimed these goods were bought for Bigelow.

Re-direct: He said he had bought the goods individually; can't recollect whether he admitted that he owed the amount of the bill or not; Tiger claimed that the goods were bought for Bigelow; the exact amount I do not remember; I do not know that Tiger denied the debt at all; He admitted that he owed for the goods; He also admitted that they had not been paid for; He claimed that he bought the goods for Bigelow; I was present at but one conversation.

Con. J. Mahar testified: I have had a conversation with the defendant in reference to the account sued on in this cause; the defendant agreed to send the money back from Pueblo to pay for the goods mentioned in that account; this was at the time of the sale of the goods; he came back afterward and said he had sold out to Bigelow, and that he wished us (Lincoln & Strickler) to send our bill to Bigelow and try and get our pay for the goods from him (Bigelow). Bigelow had an account with us (Lincoln & Strickler) at the time these goods were sold. I have always understood that Bigelow and Tiger were partners. Peter Tiger came there to Lincoln & Strickler in May, 1868, and bought a bill of goods.

Witness is here shown the account, amounting to $473.11.

I sold these goods to Peter Tiger; they were charged to his private account on the books of Lincoln & Strickler; he (Tiger) agreed to pay for them, and to send the money back from Pueblo on his trip south. At his second conversation with me, which was on his return, he told me he had sold out to Bigelow, and that Bigelow had agreed to pay for these goods, and wanted us (Lincoln & Strickler) to send the bill to Mr. Bigelow; that was on his return; he went on to make a statement when Bigelow would pay it; he stated to me in our (Strickler & Mahar's) office, at the time of the conversation testified to by the witness Huxley, which was after the commencement of this suit, that he had bought the goods, but that he had sold them to Bigelow.

and had never got any pay for them. This is the bill of goods I sold to Tiger (again referring to the above bill of goods), and they were delivered to Tiger. At the time Tiger bought the goods he wanted to get them for Bigelow, and I would not let him have them for Bigelow; I let him have them on his own account.

On cross-examination the witness was shown two bills or accounts which he said were in the handwriting of Strickler, one of the plaintiffs, and another bill or account which he said was in the handwriting of Lincoln, another plaintiff. The witness then stated as follows: Tiger asked us to make out a bill and send to Bigelow; this was after his return; it must have been four weeks after the sale of the goods; John Bigelow owes Lincoln & Strickler an account; Tiger never paid a dollar on those goods to my knowledge.

Plaintiffs then introduced their book of accounts, showing a bill corresponding with that shown the witness Mahar, amounting to $473.07.

The plaintiffs then rested, and the defendant then introduced the three bills or accounts identified by the witness Mahar, and which were entitled.

"Mr. JOHN BIGELOW,

"Bought of Lincoln & Strickler."

The first contained an item as follows:

"May 27, 1868. To balance bill, P. Tiger, $273.11."

Alexander DeLappe testified, that he presented these accounts to John Bigelow for payment some time between Christmas, 1868, and New Year, 1869; I presented them on behalf of Lincoln & Strickler.

The defendant testified as follows: I bought these goods for John Bigelow; I had a conversation with Mahar; the plaintiffs never presented any bill to me for this balance; I never had any conversation in 1868 with Mahar, after the time of buying the goods; I left Denver on the 29th of May, 1868, after the purchase of these goods, and did not return to Denver until the 4th of July following, and was not in

Denver at any time between those two dates; I never had communication of any kind with either Mahar or Strickler between those dates; I recollect the amount of the bill of goods bought May 28, 1868, it was $473.11; I took the goods away and delivered them to Bigelow; at the time of buying the goods I paid $200, on account of Bigelow, to Lincoln & Strickler, and Bigelow paid me a part of it back; it was after the serving of the attachment in this cause that I had a conversation with Mahar; Mahar asked me if I would not settle; I am not indebted to the plaintiffs one dollar, either on this or any other bill.

Cross-examination: Bigelow had bought goods before that time; Mahar told me, at the time I spoke to him about buying the goods, that I should wait a day or two until he could see whether Bigelow could have any more goods; he did not tell me if I would pay for these goods he would let me have them; he did not tell me when I came to load up these goods that he did not look to Bigelow for the pay for these goods; he asked me if Bigelow would send the money, and I told him I thought he would; I did not agree to send the money from Pueblo; I was not in business of that kind; Bigelow paid $200 on his account, that I agreed to pay for him.

Re-direct: All the goods were delivered to Bigelow, excepting a few that I delivered to a man on the road, by Bigelow's direction; I never agreed to pay for the goods.

Mr. S. E. BROWNE, for appellant.

Mr. L. B. FRANCE, for appellee.

WELLS, J. This was an action of assumpsit, to recover the price of goods sold and delivered by appellees to appellant.

The defendant below pleaded the general issue, and, by agreement of parties, the cause was tried by the court without jury, the issues were found for the plaintiffs, and damages were assessed at $473.11, the full amount claimed,

and, after overruling a motion for a new trial, judgment was given upon the finding.

The defendant asserted in the court below, that, in the purchase of these goods, he acted as the agent of one Bigelow, and that the credit was extended to Bigelow, and not to defendant.

We see no error in the rulings of the court below, touching the admissibility of evidence, and the only remaining questions which can be said to be presented by the assignment of errors are, first, whether the finding of the court below is sustained by the evidence; second, whether the damages were correctly assessed.

The first question resolves itself into an inquiry as to the weight of evidence, and we are of the opinion that we ought not to reverse the finding of the probate court, unless manifestly erroneous.

In determining the relative credit to be given to the testimony of conflicting witnesses, so much consideration is due to the manner and bearing of each under examination, and their apparent intelligence and candor or prejudice, that a court of review, to which all these things are hidden, ought not lightly to reject the opinion of either court or jury, before whom the witnesses of both parties have been subjected to both examination and cross-examination. So the rule stands upon grounds of reason, and authorities in support of it are not wanting. *Webster* v. *Vickers*, 2 Scam. 295; *Harman* v. *Thornton*, id. 351.

With this rule controlling us, we cannot say that the court below erred in preferring the testimony of the witness Mahar, sworn on the part of the plaintiff, to that of the defendant who testified in his own behalf. These were the only witnesses sworn who, so far as appears, had any knowledge of the transaction at the time of its occurrence. We find no difficulty, however, in justifying the finding of the court below, even though the testimony of the defendant be accepted as a true relation of the transaction.

It is admitted by the defendant that he bought and received the goods to the amount for which the recovery was

had; but it is claimed by his counsel that, in this purchase, he acted on behalf of Bigelow, and as his agent. Upon this point the testimony of the defendant is, and we adopt his own language, "that he bought the goods for John Bigelow, and delivered them to him."

He nowhere states that he was ever authorized by Bigelow to purchase these, or any other goods, on his account, nor whether he delivered these goods to Bigelow as belonging to him, or whether the delivery was in pursuance of a sale by himself. The law is well-settled that, where one is sought to be charged for an act done in pursuance and discharge of an alleged agency, the burden is upon him to show the fact of the agency, and that the transaction upon which the action is based was in pursuance and an ostensible discharge of that agency.

And though we should reject the testimony of Mahar, as to the subsequent declarations of the defendant, that he had sold the goods to Bigelow, and accept the fact of Bigelow's having received the goods as an acknowledgment or ratification of defendant's assumed agency, still this, according to the authorities, would not suffice to bar this action.

It must appear that there was an original appointment subsisting at the time of the transaction. *Rossiter* v. *Rossiter*, 8 Wend. 494.

It is said, that, by the testimony of Mahar, it appears that defendant and Bigelow were partners. Even if we accept the statement of the witness, as intended to have reference to this particular transaction, still it cannot, we think, defeat this action. Non-joinder of defendants is never a bar, but only matter in abatement.

We must then, upon this evidence, concur in the finding of the court below, that Tiger was originally liable to the plaintiffs, and, if liable originally, he of course remained so unless discharged by the subsequent act of the plaintiffs.

Upon this point it appears by the testimony of DeLappe, that between Christmas, 1868, and January, 1869, he, acting for the plaintiffs, presented to Bigelow an account, bearing

date in June previous, and in which, under date of May 27, is charged balance bill, P. Tiger, $273.11.

It is claimed in argument, as we understand counsel, that hereby it appears that Bigelow and not Tiger was responsible for the balance; but this item seems to us to establish the certainty of this, that is to say, that in the first instance at least credit was extended to Tiger and not to Bigelow, and the plaintiffs, by charging the amounts over to Bigelow, have not released the defendant, unless this change in the accounts was made with intent to release him and upon a consideration.

If Bigelow had agreed to pay the demand, and the plaintiffs had agreed to accept him as their debtor in lieu of the defendant, the arrangement would have been an effectual one; but no act or declaration of a creditor, however express, ought to be accepted as a release of his debtor, or as an acceptance of one in substitution for another, unless the person to be substituted assent to the arrangement, or there be some other consideration for the release or substitution, or unless it be evidenced by writing under seal, so importing consideration. We fail to find in this record any evidence that this change in the accounts was made with intent to discharge the defendant, that Bigelow ever assented thereto, or that there was any other consideration therefor. As to the intent of plaintiffs it rather appears that this item was inserted in Bigelow's account in pursuance of defendant's request, spoken of by Mahar, and out of complacency to defendant, to relieve him of the necessity of collecting from Bigelow. If the intent had been to discharge the defendant, whether Bigelow paid the amount or not, defendant would have been credited with the amount charged to Bigelow; but this does not appear. An account was rendered to Bigelow it is true, with this balance set down therein against him, but whether he assented or objected to this item was not shown. It rested upon the defendant below to establish affirmatively that Bigelow assented to the arrangement.

We are of opinion, therefore, that the probate court did

not err in finding this issue for the plaintiff. But in the assessment of damages we think there is error.

The bill of goods sold amounted originally to $473.11. The defendant testifies that he paid plaintiffs at the time of the purchase $200, which, he says, was upon Bigelow's account. In the account rendered to Bigelow, and before adverted to, plaintiffs charge Bigelow with the balance of Tiger's bill, $273.11. It is true this charge is under date of May 27, while the transaction in question appears to have taken place on the 28th; but it does not appear that defendant ever had any other bill with plaintiffs than that for these particular goods. The bill rendered Bigelow is proven to be in the handwriting of one of the plaintiffs, and, from all the circumstances in proof, we are compelled to believe that this charge in the account rendered to Bigelow refers to the identical transaction in controversy, that the $200 paid by Tiger, at the time of the purchase (which, it is true, he testified was paid on account of Bigelow, but which appears, nevertheless, to have been his own money and not Bigelow's, for he testifies that Bigelow repaid him part of it), was credited by plaintiffs to this account.

These deductions seem to us inevitable from the evidence contained in the record, and are fortified by the omission of the plaintiffs to explain in the court below, as they might have done by their own testimony, whatever is doubtful.

For the error in the assessment of damages, therefore, the judgment of the probate court is reversed, and the cause will be remanded to that court, with directions to enter judgment upon its finding for the sum of $273.11.

Reversed.

HIRSCH *v.* FERRIS.

CONTINUANCE *to obtain testimony of absent witness.* Where a witness departs from the territory without the knowledge of the party desiring his testimony within a few hours after the commencement of suit, the failure to serve him with subpœna cannot be regarded as negligence.

Where process was served July 10th, and motion for continuance was made 17th August, following, and it was alleged that negotiations for settling the matter in controversy had been carried on in the interval with reasonable hope of success, the cause should have been continued to enable the defendant to take the deposition of an absent witness.

Error to Probate Court, Arapahoe County.

Mr. W. C. KINGSLEY, for plaintiff in error.

Mr. S. E. BROWNE, for defendant in error.

WELLS, J. This action was brought to the August term, 1869, of the Arapahoe probate court. Process was served on the 10th day of July. On the 17th day of August, being at the return term, the defendant, having pleaded, applied for a continuance, which application was overruled. A trial was afterward had on that same day, and judgment was given for the plaintiff.

The refusal of the application for continuance is the only matter assigned for error.

The ground of continuance set forth in the affidavit was the absence of a material witness; the facts set forth as to be proved by this witness appear to us to be material, and it seems to be admitted by counsel that they are so. The only remaining question is, whether diligence had been used to secure the attendance of the witness.

Upon this point the affidavit sets forth that the absent witness was then, and at the commencement of the suit, a resident of Cheyenne, in the territory of Wyoming; that from the time of the commencement of the suit defendant had been endeavoring to secure a settlement of the matter in controversy, and had hoped and expected to succeed in these efforts until within three secular days next preceding the making of the affidavit, when he learned for the first time, definitely, that an adjustment of the controversy was impossible; that the witness named left the territory to go to Cheyenne within a few hours after the commencement of the action and had never returned, and that he departed without defendant's knowledge, and while defendant was

endeavoring to secure a settlement with the plaintiff, and still reasonably supposed that such settlement would be effected.

We think that considering the short period which had elapsed between the commencement of the suit and the departure of the witness, and that such departure was without defendant's knowledge, the failure to serve him with subpœna cannot fairly be said to be negligence.

Nor do we think that for the omission to secure the deposition of the witness the application should have been denied.

But a little more than one month had elapsed between the service of summons and the application; it is true the deposition might, for any thing we can see, have been obtained within that time; but this would have been an exercise of the highest degree of diligence, and this at the first term, especially in a court holding its sittings upon every alternate month.

For this error the judgment of the probate court will be reversed and the cause remanded for further proceedings.

Reversed.

---

1 404
26 529

SHIPTON et al., Trustees, etc., *v.* NORRID.

REPLEVIN *may be maintained by trustees of chattels.* Trustees of chattels, having the legal estate therein, may maintain an action at law for any injury done to or in respect to the chattels, which are the subject of the trust.

A declaration in replevin, in which the plaintiffs describe themselves as "Trustees of the Colored Zion Baptist Church of Denver, who sue for the use and benefit of said church," is good.

Error to Probate Court, Arapahoe County.

THE plaintiffs brought replevin to recover a melodeon, describing themselves in the writ and declaration as "Trustees of the Colored Zion Baptist Church of Denver." A general demurrer to the declaration was sustained in the court below.

Messrs. BROWNE, HARRISON & PUTNAM, for plaintiffs in error.

Messrs. CHARLES & ELBERT, for defendant in error.

WELLS, J. The court erred in sustaining the demurrer to the plaintiffs' declaration. If the goods in controversy were the goods of the plaintiffs, and the defendant took them, both which facts are distinctly averred, the plaintiffs may maintain this action, whether their title is an absolute or fiduciary one, or whether, if fiduciary, their *cestui que trust* is a corporation or a mere voluntary association.

There may exist a trust in chattels as well as in real estate; and if such trust be created for the benefit of a single individual or a corporation, or an association of persons not incorporated, the trustee having the legal estate is, in either case, the proper party plaintiff to an action at law for any injury done to, or in respect to, the chattels which are the subject of the trust. And he need not, in his declaration, set forth how the trust was created or his title accrued, any more than one suing absolutely in his own right. It is sufficient to aver the fact of his property and the injury.

If, upon the trial of this cause, it should appear that the plaintiffs, notwithstanding their trusteeship, had *not* the property in the goods in controversy, then, indeed, another question will be presented; but, for the present, the property is admitted by the demurrer, and the declaration is clearly sufficient.

The judgment of the probate court is reversed, and the cause is remanded to that court for further proceedings, in conformity with this opinion.

Reversed.

---

1 405
2 117

HOEHNE v. RUPEAR.

PRACTICE—*judgment nil dicit cannot be taken on return day.* Judgment *nil dicit* cannot be entered on the return day of the summons, even if the defendant appear on that day and move to continue the cause.

Error to Probate Court, Las Animas County.

Mr. W. F. STONE and Mr. E. L. SMITH, for plaintiff in error.

Mr. H. R. HUNT, for defendant in error.

WELLS, J. In this action the defendant was served with process to the August term, 1869, of the court below.

On the first day of that term he appeared and applied for a continuance upon affidavit of the absence of a material witness. The probate court declined to entertain or determine this motion, and immediately gave judgment against the defendant for want of a plea.

This was clearly erroneous. Whether the court could proceed to such judgment without disposing of the motion or not, upon which we express no opinion, we think the defendant was entitled to the whole of the first day of the term in which to plead. A judgment for default of appearance could not have been given upon that day; and we think the defendant was entitled to the same period of time, both to appear and put in his plea.

These two things he was required by the process to do upon that day, and he was entitled to the whole day to comply with the mandate of the writ.

The judgment is, therefore, reversed, and the cause remanded for further proceedings.

Reversed.

1 406
4 540

GOOD et al. *v.* MARTIN.

PRACTICE — *motion to suppress deposition too broad.* A motion to suppress a deposition founded upon objections to answers to cross-interrogatories should be denied.

PRESUMPTION *in support of record of court of general jurisdiction.* Where an attorney made oath that he had no notice of a motion for leave to amend the declaration, and there is no showing whether his clients were notified, in support of the proceedings of the court it will be presumed that notice was served upon the clients.

AMENDMENT OF DECLARATION *by increasing amount of ad damnum.* After trial and verdict in a cause, the court may, upon setting aside the verdict

and granting a new trial, allow the plaintiff to amend the declaration by increasing the amount of the *ad damnum*.

PRACTICE — *defendant's right to plead de novo after amendment.* In such case, in the absence of any showing as to the necessity for making a new defense after the amendment, the granting or refusing leave to plead anew was in the discretion of the court, of which appellants cannot complain in this court.

APPEARANCE — *effect of withdrawal upon issues.* If a defendant who has joined issue in a cause, with leave of the court, withdraw his appearance, the issue on his part falls to the ground and judgment of default should be entered against him.

PRACTICE — *default must precede final judgment.* It is irregular to proceed to final judgment against defendants served with process, without entering judgment of default.

Appeal from District Court, Arapahoe County.

ASSUMPSIT on a promissory note by Ida Martin against Parker B. Cheney, Wm. N. Shephard and Jno. Good.

Good pleaded the general issue, upon which there was a trial and verdict for plaintiff, which was set aside by the court. Afterward the court allowed the plaintiff to amend the precipe writ and narr., by increasing the amount of damages, and thereupon Good asked leave to plead to the declaration as amended, which was refused by the court.

By leave of the court, Good's attorney then withdrew his appearance, and the court proceeded to try the issue which had been joined upon Good's plea, and to assess damages against Cheney and Shephard.

Judgment of default was not entered against any of the parties.

Mr. E. L. SMITH, for appellants.

Messrs. BROWNE, HARRISON & PUTNAM, for appellee.

HALLETT, C. J. We do not think it necessary to discuss at very great length the numerous questions of practice presented in this record. The motion to suppress the deposition of Atkins was founded upon objections to some of the answers to cross-interrogatories, and was therefore too broad. While the court below might have considered the exceptions to the answers named, we do not see that

there was error in refusing to suppress the entire deposition. The amendment of the *ad damnum* in the declaration, for which leave was obtained, does not appear to have been made, and perhaps we could with propriety pass over that question. But we do not feel at liberty to do so, inasmuch as the parties have dealt with the case as if the amendment had been made, and by passing upon the question now we may facilitate the proceedings in the case, which have been greatly protracted. The power of courts to allow pleadings to be amended is pretty well established, and certainly cannot be denied at this day. Stephen's Pl. 75; Graham's Pr. 654.

It is certainly good practice to give notice of the application for leave to amend, especially when the amendment is of substance, and generally courts should require such notice to be given before the application is entertained. But we are not required to consider whether the omission to give notice in this case would have affected the order made, for it does not appear that there was any such omission. It is true that appellant's attorney makes oath that he was not notified of the intended application, but his clients may have been served with notice, and we must indulge every presumption in support of the proceedings of a court of general jurisdiction.

Authorities to support the action of the court below in allowing the *ad damnum* to be increased are not wanting. *Tomlinson* v. *Blacksmith*, 7 T. R. 132; *Brown et al.* v. *Smith et al.*, 24 Ill. 196; *Dox et al.* v. *Dey*, 3 Wend. 357.

In these cases the amendment was after verdict upon payment of costs and granting a new trial, and it is to be observed that these were the only conditions imposed. It does not appear, however, that the defendants demanded greater privileges than were given; and therefore, while these cases show that the court has power to allow the amendment, they are not conclusive upon the right of the defendant to plead *de novo* after the amendment. We do not doubt that in many cases a defendant may rightfully claim the privilege of pleading anew to an amended decla-

ration, and the refusal of such demand would be cause for reversal. If a new cause of action or substantive fact should be added to the declaration by amendment, the right of the defendant to meet the new case with a new defense would seem to be unquestionable. In this case, however, the amendment introduced no new fact into the declaration. The facts upon which appellant's liability was founded were set out in the declaration as originally framed, and appellee did nothing more than to increase the amount of her demand upon those facts. Appellants were as well informed of the nature of the action against them before the amendment as afterward, and it is difficult to see upon what ground the claim to change the defense, after the amendment, can rest. At all events, in the absence of any showing as to the necessity for making a new defense after the amendment, the granting or refusing leave to plead anew was in the discretion of the court below, of which appellants cannot complain in this court.

After the withdrawal of appearance by the attorney for Good, the issue made by him was tried by a jury and the damages were assessed against Cheney and Shephard, no judgment of default having been taken against any of them. In this we think there was error. Upon withdrawal of Good's appearance, the issue on his part fell to the ground, there being no one in court to maintain it, and judgment of default should have been entered against him. *Coffin* v. *Evansville & Crawfordsville R. R. Co.*, 7 Ind. 413.

So, also, it was irregular to proceed to final judgment against Cheney and Shephard without entering their default. *Crabtree* v. *Green*, 36 Ill. 278.

Through the failure to enter judgment of default against appellants, their right to plead to the action was not determined during the whole course of the proceedings, and therefore, upon the motion made by them, the judgment should have been set aside with leave to appellants to plead.

The judgment is reversed with costs, and the cause is remanded.

Reversed.

1 410
2 191
2 193

KLOPFER v. KELLER, Administrator.

LEGISLATIVE POWER—*authority of district courts to appoint special terms.* The statute (ch. 25, sec. 9, Revised Statutes, 267) which confers authority upon district courts to appoint special terms of such courts is valid.

UNLAWFUL DETAINER *before justice of the peace—question of title.* In an action of unlawful detainer against a tenant holding over, brought before a justice of the peace, the effect of raising the question of title is to remove the cause to another court, and not to defeat it altogether.

PLEADING AND PROOF—*in unlawful detainer.* The rule which requires that the proof shall support the allegation is as applicable to the action of unlawful detainer as to any other.

EVIDENCE—*to disprove plaintiff's case.* In an action of unlawful detainer against a tenant holding over, for the purpose of disproving the tenancy, the defendant may show that he entered as a purchaser and not as a tenant, and this whether the agreement to purchase was good or bad.

Appeal from District Court, Arapahoe County.

UNLAWFUL detainer against appellant to recover the possession of certain premises alleged to have been let to him for one month, which term had expired.

Mr. E. L. SMITH, for appellant.

Mr. L. B. FRANCE, for appellee.

HALLETT, C. J. At the threshold of this case we encounter the objection that the proceedings in the court below were *coram non judice*, having taken place at a special term. The point arises upon the validity of the statute authorizing district courts to appoint special terms of the same court, there being no question in this case as to the manner in which the power was executed. It is within our knowledge that many special terms of court have been held under this statute, and important questions have been determined in them, which, if now disturbed, will occasion much embarrassment, and we have attempted to give the subject such consideration as its importance demands.

In 1856 (11 Stat. 49), congress empowered the justices of the supreme court, in each of the territories, to appoint the times and places of holding courts in the several districts

of their territory, and, provided, that courts should be held at but one place in each district. In 1858 (11 Stat. 366), this statute was so far enlarged as to admit courts to be held at the expense of the territory in the several counties in each district. In 1861 the act organizing this territory was passed, which provided: "The said territory shall be divided into three judicial districts and a district court shall be held in each of said districts, by one of the justices of the supreme court, at such time and place as may be provided by law."

The use of the singular instead of the plural number in this clause of the act was, doubtless, through inadvertency, as, in view of the previous legislation of congress to which referehce has been made, it is hardly probable that congress intended to limit the number of courts in each district to one. But this act confers upon the legislative assembly power to prescribe the times and places of holding courts, and being inconsistent with the act of 1856, renders the latter act inapplicable to this territory. The power of the legislative assembly to prescribe the times and places of holding courts is conceded, but whether that power is properly exercised in conferring upon the courts authority to appoint terms is a question upon which doubts have arisen.

In *Harriman* v. *The State*, 2 G. Greene, 270, this question came before the supreme court of Iowa upon a statute passed by the legislative assembly of Iowa territory, under a provision of the organic act of that territory, similar to our own. In that case the court say: "Finally it is objected that the legislature of the territory had no right, under the ninth section of the organic law, to pass an act authorizing the judges to hold such special terms of the district court, as they were by said section to be held at such times and places as might be prescribed by law. Strictly viewing this clause, it may very plausibly be assumed that the courts may be held at such times only as the appropriate law might fix upon and designate. The application of this principle might safely be admitted so far as the regular terms of the courts are concerned; and this concession would not, in the least, militate against the power of the legislature to authorize the judges

to hold special or extra terms of their courts whenever, in their opinion, occasion might require. This would be a rightful subject of legislation within the meaning of the organic law and within the province of the legislative assembly."

In the State of Illinois the constitution of 1818 provided that circuit courts should be held at the times prescribed by law, and with this provision in force the legislature authorized such courts to appoint special terms. The constitutionality of the law does not appear to have been brought in question, although the act was before the supreme court of that State upon other points. *Archer* v. *Ross*, 2 Scam. 303.

We find, from an examination of the reports of other States (1 Blackf. 428; 17 Mo. 64; 16 Cal. 186; 3 Wis. 443), that such acts are not uncommon in this country, and the constitutional power of the legislature to pass them is so generally accepted by the profession that it has not been questioned.

Therefore, upon authority, we believe that the question is at rest, and we are not disposed to seek for a new construction which may divest established rights.

A motion was made in the court below to dismiss the cause for want of jurisdiction in the justice of the peace before whom the suit was originally commenced. It is claimed that an affidavit was filed under the ninth section of the act before the justice of the peace, in which it was asserted that the title to the property described in the complaint was in dispute between the parties. Although such an affidavit was read in the district court, it does not appear that it was ever presented to the justice of the peace. And if it had been so presented, and the justice had refused to act upon it, it is difficult to see upon what ground the dismission of the cause would result from it. The effect of raising the question of title before a justice of the peace is to remove the cause to another court, and not to defeat it altogether. It is not necessary to point out the various cases in which an action may be maintained under the statute relating to forcible entry and detainer. It is sufficient to say that this

action was founded upon section 5 of the act, which relates to cases of tenancy. It is alleged in the complaint, that the premises in controversy were let to appellant for the term of one month, which term had expired, and that appellant refused to surrender the possession upon demand made in writing therefor. This is according to section 11 of the act, which requires that the substantial facts, upon which the plaintiff relies, shall be set out in the complaint. The office of pleading is the same in this action as in every other, and the rule which requires that the proof shall coincide with the allegations is as applicable to this as to any other action. To allow a plaintiff to allege one thing and prove another would be an anomaly in the law, and most mischievous in its consequences. If then the plaintiff must prove his case, as laid in the complaint, it follows that evidence tending to disprove the facts stated in the complaint is admissible on the part of the defendant, although such evidence might also tend to prove another case upon which the plaintiff might, if he had so declared, maintain his action. Upon the trial in the court below, appellant introduced evidence to show that he went into the possession of the premises in controversy as a purchaser. This evidence the court afterward excluded from the consideration of the jury upon the ground, as stated by counsel, that the agreement to purchase was not valid under the statute of frauds. Now the question before the jury was as to the existence of the tenancy set out in the complaint, and whether appellant was holding over after the expiration of his term, and if the agreement between the parties was to purchase and not to let the premises, it can make no difference whether the agreement was void or valid. The object of showing that appellant entered under an agreement to purchase was to disprove the tenancy, and the negative effect of such evidence would be the same whether the agreement was good or bad.

We think that there was error in excluding this testimony from the consideration of the jury, for which the judgment must be reversed with costs and the cause remanded.

Reversed.

PHELPS v. SPRUANCE.

1 414
2 88
2 383
3 115
3 200
3 267
3 292
6 555
1 414
7a 463

JURISDICTION OF PROBATE COURT *to issue process to foreign county.* Under section 2 of the practice act (Rev. Stat. 500), a probate court may issue process to a foreign county.

PRACTICE — *variance, how reached.* A variance between the writ and declaration cannot be reached by demurrer. It is matter for plea in abatement.

PRACTICE — *amended bill of particulars.* If the plaintiff file a bill of particulars with his declaration, and the defendant make no objection to such bill, and the plaintiff afterward, and within ten days of the second term, file a more specific bill of particulars, the defendant cannot obtain a continuance at the second term, because of the filing of such amended bill.

VERDICT — *what will be sufficient.* A verdict which answers all the issues is sufficient.

BILL OF EXCEPTIONS — *in trial to the court without a jury.* If a cause is tried to the court without a jury, exception must be taken to the judgment of the court, if the party aggrieved wishes to have it reviewed in this court.

In such case a motion for new trial is unnecessary, but the exception to the judgment of the court is indispensable, if that judgment is to be reviewed here.

Error to Probate Court, Clear Creek County.

Mr. Justice WELLS, having been of counsel, did not sit in this cause.

Mr. GEO. W. PURKINS, for plaintiff in error.

Mr. E. T. WELLS, for defendant in error.

HALLETT, C. J. The power of the probate court to issue process to a foreign county, under section two of the practice act, has been considered by us at this term in the case of *Cody* v. *Raynaud*, and, according to the views there expressed, the probate court had jurisdiction in this case. Variance between the writ and declaration cannot be reached by demurrer. It is matter for plea in abatement. *Duvall* v. *Craig*, 2 Wheat. 45.

No objection was made by plaintiff in error to the account filed with the declaration, but, at the second term of the court, he moved to continue, upon the ground that defend-

ant in error had voluntarily filed a more specific bill of particulars within ten days of the term. If a defendant is dissatisfied with the account filed with the declaration, the practice is to move the court for a rule upon the plaintiff to furnish a more specific bill, and, when the new bill comes in, if it differs materially from that first filed, the court will continue the cause upon the application of the defendant. In this case plaintiff in error, who was defendant below, did not ask for a more specific bill of particulars, and defendant in error was under no obligation to file any; therefore no question can be raised in this court in respect to it.

The general issue was pleaded, and also another plea, in which it was alleged that the promises in the declaration mentioned were made by the Phelps & Gillimore Mining Company, and not by the defendants, and that defendants were not partners or joint-contractors, etc. Issue was joined upon these pleas, and, upon trial thereof, the court found that plaintiff in error "did assume and promise, in manner and form, as the said William Spruance hath complained against him." And this, it is said, is not an answer to the issue upon the second plea; but we are of another opinion, for the second plea is, at best, only a repetition of the first. If the finding is true the plea is untrue; for, if plaintiff in error promised in manner and form as alleged in the declaration, he did promise jointly with Gillimore, and it is his promise and not the promise of the mining company. The finding certainly comprehends all that was in issue, and no more is attainable in any form of verdict.

It is also urged that excessive damages were allowed, and this would be a question of some difficulty if it were properly before us. But the question is not presented in the way provided by the law, as we shall endeavor to show. This was a trial by the court without a jury, a proceeding unknown to the common law, and, by the rules of the common law, the decision or finding of the court upon the testimony is not subject to review in another tribunal. *Campbell* v. *Boyreau*, 21 How. 226.

But section 22 of our practice act has wrought a change in the common law, as follows:

SEC. 22. "Exceptions taken to opinions and decisions of the district courts, upon the trial of causes, in which the parties agree that both matters of law and fact may be tried by the court, and, in appeal cases, tried by the court without the intervention of a jury, shall be deemed and held to have been properly taken and allowed; and the party excepting may assign for error, before the supreme court, any decision or opinion so excepted to, whether such exception relates to receiving improper or rejecting proper testimony, or to the final judgment of the court upon the law and evidence."

When we consider that the power to review the finding of the court below upon the testimony is derived entirely from this statute, it is not difficult to understand that an exception to the ruling of the court is necessary to give us jurisdiction. In cases of this kind the aggrieved party may except to the decision of the court, and may assign for error the decision so excepted to. But if he fails to except in this, as in every other case in which an exception is necessary, he cannot seek relief in an appellate court. And this is in perfect harmony with the practice which obtains in cases tried by jury. In such cases the party aggrieved must move for new trial, and except to the ruling of the court upon the motion. In cases tried by the court, the motion for new trial may be dispensed with, but the exception to the judgment of the court is indispensable if that judgment is to be reviewed in this court. As in such cases, the court determines both the law and the fact; if an exception were not necessary, it would be a departure from all analogous rules of practice.

There was a motion in arrest of judgment, but it presented only those questions to which we have adverted, and it is not necessary to notice it particularly. Upon this review we have not found error in the record, and the judgment is affirmed with costs.

Affirmed.

DOANE et al. v. GLENN et al.

1 417
13a 278

1 417
15a 59

JUDGMENT — *what is final.* A judgment in favor of interpleading claimants in an attachment suit is final, and the plaintiff in attachment may prosecute a writ of error to reverse such judgment.

Error to District Court, Arapahoe County.

UPON motion to dismiss the writ of error.

Messrs. FRANCE & ROGERS, in support of the motion.

Messrs. CHARLES & ELBERT, *contra.*

BELFORD, J. At the December term of the Arapahoe district court, for the year 1870, the plaintiffs in error caused to be sued out of the clerk's office of said court a writ of attachment against Oliver S. Glenn and Rufus E. Talpey, which writ was duly levied on seven hundred head of cattle, alleged to be owned by the defendants in the attachment suit. At the same term of court, Lockhart T. Glenn and George O. Talpey appeared as interpleading claimants under section 21 of the attachment act, alleging that they were the owners of the property theretofore attached, and demanding restitution of the same. Issues were joined, a trial had, a verdict rendered in favor of the interpleading claimants. Motion for new trial overruled and judgment entered on the verdict. From this judgment Doane & Co. have prosecuted a writ of error, and the interpleading claimants having made a motion to dismiss the same, the only subject for present consideration is, does a writ of error lie to a judgment in favor of these claimants, or in other words, is it such a final judgment as can be brought to this court for review.

The authorities all concur in holding that, to authorize a writ of error, it is necessary that there should be a final judgment or determination upon the matter in controversy in the inferior court, and it is never employed merely to bring up interlocutory decisions or discretionary orders

made pending the litigation. Usually, this writ, being a common-law writ, is directed only to courts proceeding after the course of the common law. In the cases of *Forgay* v. *Conrad*, 6 How. 201, and *Beebee* v. *Russell*, 19 id. 283, it is said: When a decree decides the right to property and directs it to be delivered up or sold, and the complainant is entitled to have such decree carried into immediate execution, it is a final decree. The judgment below is in the following form: * * * "Therefore, all and singular, the premises being seen, and by the court here fully understood, it is considered by the court, that the property taken by virtue of the writ of attachment in this cause be delivered up to the said Lockhart T. Glenn and George O. Talpey, and that a writ of *retorno habendo* be awarded and issued therefor; and it is further considered by the court, that the said interpleading claimants do have and recover, of and from the said plaintiffs, their costs, by them in and about this said suit, in this behalf, laid out and expended, taxed at , and have execution therefor."

This, most clearly, is a complete determination of the rights of the attaching plaintiffs and interpleading claimants.

This judgment would be a bar, in behalf of the latter, against any further suits instituted by the former parties. It operates as a release to the attachment lien and leaves the claimants at liberty to take the property when and whithersoever they please. It established their title to the cattle, not only against the attaching plaintiffs but against the attaching defendants, for no court would permit or suffer the defendants in the original suit to assert ownership after standing by, and without interposing any objection or supplying any evidence, allow a third party to make proof of title to the property in litigation, which would result in the ruin of the rights of the attaching plaintiffs.

The rule laid down by the supreme court of the United States is, that when a decree decides the right to property and directs it to be delivered up, it is a final decree, and

does not the judgment or decree above set forth come clearly within it?

What remains to be done by the claimants?—nothing, but await delivery. The power of the court in the premises is at an end. The issues formed by the parties have received a judicial determination, that is final, so far as the district court can make a finality, and the judgment so entered must stand as the unquestionable and unassailable evidence of the claimant's right to the property adjudicated, until reversed or set aside by a superior tribunal.

No principle can be more just than the one that asserts that all proceedings of inferior courts, which conclusively affect the rights or property of persons, ought to be subject to the revision or correction of a higher tribunal. Blackstone says: "A judgment is the sentence of the law pronounced by the court on the matter contained in the record." Did not the court pronounce the sentence of the law in the matter before it, and contained in the record made by the parties? Coke says: "A writ of error does not lie, without a judgment or an award in the nature of a judgment." Is not the order of the court below, that the attachment lien be set aside and the property delivered up to the claimants, an award in the nature of a judgment? It was final, as it respected the district court, for it did all it could do in the case.

If we are to be governed by the words which Coke lays down as a test of what is a final judgment, namely, "*ideo consideratum est*," then we must regard this as a final judgment.

Tidd, in his excellent work on Practice, volume 2, page 1134, says: "A writ of error is an original writ, and lies when a party is aggrieved by an error in the foundation, proceeding, judgment or execution of a suit in a court of record. And whenever a new jurisdiction is erected by act of parliament, and the court or judge that exercise this jurisdiction act as a court or judge of record according to the course of the common law, a writ of error lies on that judgment; but when they act in a summary way, or in a

new course different from the common law, then writ of error lies not, but a certiorari."

In Bacon's Abridgment, volume 3, page 330, the doctrine is laid down as follows: "Where the primary tribunal is a court of record, a writ of error is the proper process for the removal of the proceedings when they were according to the course of the common law in the first instance, or have assumed a common-law shape subsequently; but when they are summary, or the magistrate is not the judge of a court of record, the remedy is by certiorari." In the case of *Huse* v. *Grimes*, 2 N. H. 210, the court say: "A writ of error is grantable *ex debito justiciae;* it is a matter of right, and lies in all cases where the court, whose proceedings are complained of, acts as a court of record according to the course of the common law."

"A certiorari is said to lie in all cases where a writ of error does not. As it respects individuals, it issues *ex mero gratia* on petition. It lies to remove indictments from inferior jurisdictions to the court of king's bench for trial; also, to reverse the doings of inferior jurisdictions, whose powers are given them by statute, whose mode of proceeding is unknown to the common law, and who render their doings effectual not by a judgment technically called, but by orders to be executed in a summary way, such as orders for laying out of highways and removal of paupers." While the right to file an interplea in the method pursued below is derived from the statute, yet the statute does not point out the mode of trial or the nature of the judgment to be rendered; these are both governed by the common law. The issues are joined, trial by jury had, verdict pronounced and judgment awarded. The court is a court of record, and its proceedings are all in accordance with the common law. Taking the distinction between a writ of error and a certiorari laid down by the New Hampshire court to be a true one, into which class of cases therein named does the one at bar necessarily fall? Here was a judgment rendered in a court of record proceeding according to the course of the common law. The judg-

ment was a common-law judgment, and not an order to carry into effect certain proceedings in a summary way. This case then has all the requisites to be the foundation of a writ of error. The other points mentioned by counsel for defendants will be decided when properly brought before us.

The motion to dismiss the writ of error must be denied.

Motion denied.

---

1 421
9a 180

PEDDIE *v.* DONNELLY.

PLEADING — *variance may be alleged under non est factum.* In debt on a promissory note, the defendant may take advantage of a misdescription of the note under the plea of *non est factum*.

PLEADING — *variance in description of note.* In an action against two it was alleged "that the defendants made their note, the said Abram D. Bevan by the name and style of A. D. Bevan," and the note was signed by A. D. Bevan and his co-defendant. *Held*, that there was no variance, and there was no ground of demurrer to the declaration.

PLEADING — *contemporaneous agreement as defense to a note.* In an action on a promissory note if the defendant sets up a contemporaneous agreement modifying the note, he must allege in his plea that the agreement was in writing.

Error to Probate Court, Jefferson County.

THE first plea of defendant Peddie was *non est factum* verified by the oath of the defendant. In his second plea defendant Peddie alleged that the action was brought on the note described in the declaration only, and that the note was given by defendant Bevan and himself for money borrowed by Bevan to enable him to go to St. Louis, to sell mining property belonging to the plaintiff, and that it was agreed, between plaintiff, Bevan and himself, at the time the money was borrowed, that the same should be repaid out of the proceeds of the sale of the said mining property, and that said sum of money should not be repaid until Bevan sold the property, which event had not occurred.

It was not alleged that this agreement was in writing. The promissory note given in evidence was as follows:

"BRECKENRIDGE, 1868.

"*Colorado Terry, Oct.* 3.

"Four months after date we, or either of us, promise to pay to Charles Donnelly, or order, the sum of ($300) three hundred dollars lawful money, for value received, with interest at the rate of three per cent per month until paid.

"A. D. BEVAN. [L. S.]

"ANDREW PEDDIE." [L. S.]

The court below gave judgment for the plaintiff.

Mr. GEORGE W. PURKINS, for plaintiff in error.

Messrs. MILLER & MARKHAM, for defendant in error.

WELLS, J. We agree with counsel for the plaintiff in error, that the plea of *non est factum* was sufficient to give advantage of any variance between the obligation counted upon and the allegations descriptive thereof, but we are not able to agree that the alleged variance exists in this case. The count avers that "the defendants heretofore, to wit, on, etc., at, etc., the said Abram D. Bevan, by the name and style of A. D. Bevan, made their certain writing obligatory," and out of the words "the said Abram D. Bevan, by the name and style of A. D. Bevan," it is argued the variance arises; for it is said hereby it appears that the obligation was on its face the deed of Bevan only, whereas that offered in evidence was subscribed and sealed by both the defendants. It appears to us, however, that the words of the declaration last quoted are to be read as if written in parenthesis, importing description of the manner in which the defendant Bevan executed the writing, and not as contradicting what is also alleged, "that the defendants made their writing obligatory."

And this disposes of the objection that the demurrer to the special plea, interposed in the court below, should have been sustained to the first count of the declaration. There

was no substantial defect in that count to which the demurrer could have been extended. The only question remaining is, as to the sufficiency of the special plea.

If this were a new question we might be inclined to doubt whether the language of the plea ought not to be construed as importing that the supplemental undertaking, upon which the defendant relies, was, as the law requires, in order that it should be effectual, in writing; for, though it appears to be well settled that a promise in writing, absolute, may not, by parol, be turned into a promise upon condition (*Hoare* v. *Graham*, 3 Camp. 57; *Nausen* v. *Walker*, 1 Stark. 361; *Free* v. *Hawkins*, 8 Taunt. 92; *Woodbridge* v. *Spooner*, 3 Barn. & Ald. 233; *Mosely* v. *Robinson*, 10 B. & C. 729; *Brown* v. *Langley*, 4 M. & Gr. 473), yet this seems to be rather a rule of evidence than of pleading, and the defendant having set forth an agreement which, if established, will bar the plaintiff of his present action, it would seem that this ought to suffice, although he has not shown by what manner of evidence he will sustain his plea.

Nevertheless, it has uniformly been held, so far as the authorities have come to our notice, that, if plaintiff count upon a writing, and the plea show an agreement contemporaneous and modifying its terms, it must show that this agreement also was in writing. *Mease, Executor*, v. *Mease*, 1 Cowp. 47; *Wells* v. *Baldwin*, 18 Johns. 46; *Miller* v. *Wells*, 46 Ill. 49. And, if it fail in this, plaintiff may demur generally.

The judgment of the probate court is, therefore, affirmed.

Affirmed.

NACHTRIEB *v.* STONER.

1 423
7 552

NEW TRIAL—*damages in trespass de bonis.* Where it appears that the defendant procured an inferior court to issue an attachment in a case not warranted by law, and to give judgment upon constructive service for a fictitious demand, and sell property of plaintiff of the value of $300, a verdict of $750 damages is not excessive.

POSSESSION *in trespass de bonis.* In trespass *de bonis* the plaintiff must show, that at the time of the alleged trespass he was in possession of the property, or that he had the right to the possession, and an outstanding possession in a third person, with the right to retain it until the payment of indebtedness or the happening of some other event will defeat the plaintiff's action.

POSSESSION OF PLEDGEE *extinguished by payment.* Where the plaintiff pledged property to a third party to secure certain indebtedness, due from him to such party, and the defendant, in order to levy a writ of attachment upon the property, paid to the pledgee the amount due him from the plaintiff, when such payment was made the right of possession reverted to the plaintiff, and he may maintain trespass for the property.

POSSESSION OF PLEDGEE *determined by setting up adverse title.* In such case the defendant, having set up a title inconsistent with the lien, cannot claim to have acquired the pledgee's right of possession, and hold under the lien.

TRESPASS — *justification under process of inferior court.* Whoever justifies or asserts any right under the sentence or judgment of a court of inferior jurisdiction ought to be required to show the substantial regularity of its proceedings at every step.

ATTACHMENT WRIT — *which recites no cause, is irregular.* That the defendants reside out of the county is no ground for issuing an attachment, and a writ, in which this is recited as the cause of attachment, is irregular on its face.

TRESPASS *against plaintiff in attachment — when proceedings irregular.* Where the proceeding was before a justice of the peace, the cause of attachment set out in the affidavit was insufficient, and it was stated in the writ that the defendants reside out of the county; the plaintiff who procured the writ, the justice of the peace who issued it, and the officer who executed it, are liable to the defendants in trespass.

The affidavit being defective, the rule is not affected by the power of amendment given by statute, for the court does not know that the facts exist upon which a proper affidavit may be made.

If the affidavit had been sufficient and the writ had falsely recited it, the court might incline to a different opinion.

Error to Probate Court, Lake County

THE record of the court below consisted of certified copies of the papers filed in that court, together with some informal minutes of the proceedings of the court.

The judgment was in the following form: "Thereupon, judgment is entered in favor of the plaintiff, William Stoner, and against the defendant, Charles Nachtrieb; that the said plaintiff have and recover of the said defendant the sum of

$750, being the damages assessed by the jury in said case, with costs."

At the trial the plaintiff gave in evidence that defendant, on the 10th day of November, A. D. 1870, filed an affidavit and bond with George B. Berry, a justice of the peace of Lake county, and that Berry thereupon issued a writ of attachment against the plaintiff, William Stoner, and one Thomas Murphy, which writ was levied on the two mares described in the declaration, and was returned without personal service on Stoner or Murphy; that the cause was continued by the justice at the return day of the writ, and notices were posted as directed by the statute; that, upon the adjourned day, said justice of the peace gave judgment against Stoner and Murphy, and in favor of Nachtrieb, for $300 and costs of suit; that the two mares were sold under said judgment to one George Holger, who was requested to purchase them by Nachtrieb. The plaintiff was sworn, and testified that he purchased the mares of Murphy, on the 1st of October, 1870; that at that time one of the mares was in charge of John Burnett, and we directed him to take charge of the other one; that Burnett had charges against Murphy of $15, and there was an understanding that Burnett was to keep the mare till he got his pay; that the mares were worth $300; that he did not hear of the suit of Nachtrieb against Stoner and Murphy, until about the first of April; that witness did not, nor did witness and Murphy owe Nachtrieb any thing at the time of the commencement of the suit before Berry. Thomas Murphy testified to substantially the same facts.

John Burnett testified that he delivered one of the mares to the constable on payment of his charges, which amounted to $15. The plaintiff also put in evidence the affidavit and bond, filed with the justice of the peace, and also the writ of attachment issued by him. In the affidavit it was alleged: "That Thomas Murphy and William Stoner have departed for the purpose of defrauding their creditors, and are about to remove their property to his, the said Charles Nathrop's, disadvantage and loss, with the intent of placing it beyond the

reach of their creditors." The bond was made to the constable as obligee therein. Plaintiff also gave in evidence a transcript of the docket of the justice of the peace in the case of *Nachtrieb* v. *Stoner and Murphy*.

In the writ of attachment the cause recited for the issuing thereof was, "that Thomas Murphy and William Stoner reside out of the county." The defendant gave in evidence that Murphy and Stoner bought a ranche of him for $300, and that the amount was still unpaid; that he commenced suit before the justice of the peace in good faith, and that the mares were worth $240.

The court refused to instruct the jury: "That if any person had a lien upon the property named in the plaintiff's declaration, by which any sum of money was to be paid by the plaintiff before he could reduce the same into his possession, they should find for the defendant."

Upon request of the plaintiff, the court instructed the jury: "That by his record, as appears in evidence, the magistrate had no jurisdiction which would justify the seizure of any property of William Stoner, and if the jury believed, from the evidence, that the horses in question were seized in that suit under the affidavit, writ and bond referred to, it does not amount to a justification, and the jury should find for the plaintiff." There were other instructions which it is not necessary to refer to.

Mr. M. BENEDICT, for plaintiff in error.

Messrs. HUGHES & MORRISON, for defendant in error.

WELLS, J. The record, which has been certified to us, contains many gross irregularities, and the original appears to have been made up without the slightest knowledge of what matters the record of a court ought or ought not to contain. Nevertheless, sufficient appears to show that the judgment complained of was given at a term of the probate court, convened, constituted and held in accordance with law. The objections urged on the part of the plaintiffs in error in this respect are therefore not well taken.

Neither are we disposed to interfere with the judgment in respect of the damages awarded by the jury. The plaintiff in the court below complained in effect, that the defendant had procured an inferior court to issue an attachment against the plaintiff's estate in a case where such process was unwarranted by law, and to give judgment and direct a sale of the estate upon mere constructive notice of the proceeding, he being then a resident of the territory, and entitled to actual notice by service of process; that by virtue of the sale so ordered, the defendant had possessed himself of, and converted to his own use, property of the plaintiff to the value of several hundred dollars, and that all this was done in the prosecution of a pretended claim of indebtedness which never existed. The jury have found that the facts are as asserted by the plaintiff; the evidence warrants the finding, and, as we think, makes a strong case for the award of punitory damages, and the amount allowed by the jury does not seem to us to be excessive.

The circumstance, that before the alleged trespass a portion of the property was in the possession of a third person who had a special property therein by way of lien or pledge, does not, as we think, have the effect to defeat the plaintiff's action or modify the rule of damages. True, it is, in general, that in *trespass de bonis* the plaintiff must show, that at the time of the trespass complained of he had actual possession of the goods, or had property therein, either general or at least special, with the right to the immediate possession, and an outstanding possession in a third person, with the right in such person to retain it until the discharge of an indebtedness or the happening of some other condition might, with reason, be said to disable the general owner from bringing trespass. *Gauche* v. *Mayer*, 27 Ill. 134; *Thorpe* v. *Burling*, 11 Johns. 285; *Gay* v. *Smith*, 38 N. H. 171.

For in such case the interest of the general owner is merely reversionary and not present, and for an injury to such interest case lies but not trespass. But, in the present case, the demand for which the goods had been held in pledge

was paid off by the plaintiff in the attachment, now plaintiff in error, before the levy, which involves the trespass complained of, and we think this, by construction of law, restored the general owner to his possession, for, though the pledgee of goods may clearly enough transfer possession thereof to another, as his servant or bailee, without waiver of his lien, and though, as we conceive, any third person may advance to the pledgee his demand, receiving possession of the goods as his security, and may lawfully retain such possession until repaid his advances, yet the authorities appear to be uniform, that if the pledgee or lienholder set up any title or claim inconsistent with or independent of the lien, this will amount to a waiver thereof. 3 Pars. on Cont. 244.

Therefore, inasmuch as the possession of the constable who levied the attachment complained of was from the beginning independent of and hostile to the lien by which the property had before been held — the very purpose for which the money was advanced to the pledgee being to enable the officer to proceed with the property in a manner inconsistent with the lien — it cannot be said that this incumbrance or special property followed the goods into the custody of the constable. On the contrary, by the payment of the amount for which the goods had before been held, the lien was dissolved and the right to the immediate possession was *eo instanti* restored to the general owner.

There remains to be considered the question to which the argument was chiefly directed, whether the plaintiff's action was rightly conceived, that is to say, whether trespass lies here or case. Upon this question we are not without authority, though it is to be regretted that the authorities are not in strict accord. It appears to be well settled, that if an inferior court assume to extend its process to a case wherein it is not warranted by law, both the magistrate and the party who instigates the unlawful proceeding are liable in trespass, and that although the cause or matter be within the jurisdiction of the court or magistrate in general, yet if there be some prerequisite prescribed by law to the exer

cise of such jurisdiction, and the process issue without such prerequisite, all parties concerned, save the ministerial officer, where the process fails to disclose irregularity upon its face, are trespassers.

Vosburg v. *Welch*, 11 Johns. 175; *Curry* v. *Pringle*, id. 444; *Adkins* v. *Brewer*, 3 Cow. 206; *Reynolds* v. *Orvis*, 7 id. 271; *Grumon* v. *Raymond*, 1 Conn. 40; *Polk* v. *Slocum*, 3 Blackf. 422; *Barkeloo* v. *Randall*, 4 id. 476; *Davis* v. *Bush*, id. 330.

Some of the cases to which I have referred are directly to the point that the affidavit and bond required by statute are essential prerequisites to the issuance of the writ of attachment, and that without these no jurisdiction is acquired; and this seems to be adjudged also in *Wight* v. *Warner*, 1 Doug. (Mich.) 384; *Mantz* v. *Handby*, 2 Hen. & Munf. 308; *Clark* v. *Roberts*, Breese, 285; *Matter of Faulkner*, 4 Hill; *Staples* v. *Fairchild*, 3 Comst. 41; *Shivers* v. *Willson*, 5 Harr. & J. 130; and in other cases which were cited at the bar.

In some courts, indeed, it has been held, both where the question arose directly and where it arose in a collateral proceeding, that a failure to comply with the statutory prerequisites will avoid the writ and all subsequent proceedings even in a court of general jurisdiction. *Whitney* v. *Brunette*, 15 Wis. 68; *Willson* v. *Arnold*, 5 Mich. 98; *Greenvault* v. *Farmers' Bank*, 2 Doug. (Mich.) 498.

I do not discover that any of these cases are upon statutes, essentially different from our own so far as concerns the requirements of the affidavit and security, or so far as relates to the effect and consequences of an omission in this respect; and though we are not prepared to hold, with the cases last cited, that defects in the affidavit or bond given shall, in superior courts of general jurisdiction, invalidate the subsequent proceedings, yet we think this may well be asserted as the rule where the proceeding is in an inferior court, not of record (at least where the defect is a substantial one), whether the question arise directly or collaterally; for as to these latter courts no one ought to be at liberty to

assume that their proceedings are regular either in form or substance; whoever justifies or asserts any right under the sentence or judgment of such a court ought to be required to show the substantial regularity of its proceedings at every step. There ought to be no exception to this rule save in favor of the ministerial officer who executes process regular upon its face. The cases of *Voorhies* v. *Bank of the United States*, 10 Pet. 449; *Cooper* v. *Reynolds*, 10 Wall. 320; *Ludlow* v. *Ramsey*, 11 id. 582, have been sometimes thought to assert the doctrine that jurisdiction may be acquired by seizure of the estate of the defendant, so as to empower the court, under whose process the seizure is made, to award sale of such estate whether the requirements of the law antecedent to obtaining the writ have been complied with or not.

But in the first of these cases the court expressly affirm the principle that "all the requisitions of the law are conditions precedent, which must be performed before the power of the court to order a sale can arise," and the title there in controversy was sustained upon the ground that the statute under which the attachment proceeding was had did not prescribe what should be received as evidence of compliance with its requirements in this respect, or direct that any record of such compliance should be preserved, and the question being, therefore, left to depend upon those general principles of law by which the validity of sales under judicial process are determined, and it appearing of record that the writ issued was that prescribed by law, or, to use the language of the opinion, "the same as prescribed by law," the court thereby acquired jurisdiction of the cause of action and the property. The record was silent as to whether the requisites of the statutes anterior to the issuing of the writ had or had not been complied with; and, as we understand the opinion, the court supply the omissions of the record in this respect by the application of the maxim *omnia rite esse acta*.

So in *Ludlow* v. *Ramsey* the proceeding was by bill to vacate the sale for insufficiency of the affidavit. The court

held the affidavit sufficient in substance, but referring to what had before been decided in *Cooper* v. *Reynolds*, and pursuing the doctrine of that case, say that the sole question is, whether the court obtained jurisdiction; that its general jurisdiction of such process is not denied; and that the writ of attachment in the particular case "appears to be in due form of law, and to have been regularly served upon the property, so that the court became fully possessed of jurisdiction in the case." So in *Cooper* v. *Reynolds*, MILLER, J., who delivered the opinion, says:

"It seems to us that the seizure of the property, or that which in this case is the same in effect, the levy of the writ of attachment upon it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of the plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form, under the seal of the court, and is by the proper officer levied upon property liable to attachment when such writ is returned into court, the power of the court over the *res* is established. The affidavit is the preliminary to the issuing of the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed to observe all the requisite formalities, but the writ being issued and levied, the affidavit has served its purpose, and though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon the defendant's property."

It appears to me, that while in the cases referred to the supreme court of the United States have gone much beyond the courts of most of the States in sustaining judicial proceedings of the character now under consideration, yet that they cannot, with accuracy, be said to go further than this, to wit: That defects in the affidavit or other preliminary steps shall be disregarded, if by a writ substantially perfect, and not showing upon its face any omission of the previous

requirements of the statute, the proper officer of the court has seized the estate of the defendant within the territorial jurisdiction. But I conceive it to be clearly the doctrine of these cases that there must be a perfect writ.

Under our system, it is true, a perfect writ upon a defective affidavit cannot be, for the statute requires the affidavit to be recited in the writ, but elsewhere the two may perhaps concur.

Now the present case is clearly distinguishable from the cases in the supreme court of the United States, in this: that, while in all of these the writ issued out of a court of general jurisdiction, and was fair upon its face, here the writ is out of an inferior court, and recites as the ground of its issuance that "oath has been made that the defendants reside out of this county," which was no ground in any case. The writ was, therefore, absolutely void, and would not have availed to protect even the ministerial officer who executed it.

It was argued at the bar, however, that no writ of attachment can, under our statute, be held void, whatever its defects; for, it is said, notwithstanding any deficiency therein, or in the affidavit or bond, the same may not be quashed, but, by the eighth section of the statute, shall be amended, and what is void cannot be made valid; and, therefore, it is concluded, absolute invalidity cannot be predicated of process which, by positive law, is susceptible of amendment.

This same distinction is frequently taken in the books, and seems, in some cases, to have been thought applicable to cases like the present — as in *Owens* v. *Starr*, 2 Lit. 230; and *Booth* v. *Rees*, 26 Ill. 48, in which latter case it was held that a writ of attachment, issued upon affidavit, averring the statutory causes upon information merely, should protect even the justice of the peace who issued it, and the plaintiff who procured it. But we conceive that the question, whether it may or may not be within the power of the court to allow an amendment of any particular process, is not, in all cases, decisive of the other question, whether

such process may or may not suffice to sustain a judgment given thereon. In the present case it cannot be said that the writ is amendable (and, therefore, voidable merely) in the sense in which the word is generally used in the books, for the defect here is such that there can be no amendment of the writ, without a new affidavit of facts not now appearing; and there cannot be such further affidavit unless the requi site facts exist, which does not now appear. Therefore it cannot now be known that the statutory power of amendment can ever be called into exercise, or the writ ever be amended; and we are not able to agree that one who has, to his own profit and his neighbor's injury, set in motion the process of the law "to which, by his own showing, he is not entitled, ought to be protected by that process;" because, possibly, upon a state of facts not shown, he might have obtained leave to correct his errors and perfect his writ, and so it was held in *Whitney* v. *Brunette*.

If the original affidavit had been sufficient, and the writ had falsely recited it, we might incline to a different opinion; but upon this record as it now stands, it does not appear that the defects in this process could have been corrected.

The judgment of the court below is affirmed, and the defendant in error will recover his costs in this court.

Affirmed.

---

1 433
14 301
1 433
2a 507

LOVELAND v. SEARS.

AMENDMENT *of sheriff's return after judgment.* Upon leave of court a sheriff may amend his return on a summons at a term subsequent to that at which judgment was rendered, and after the record has been removed to the supreme court.

BILL OF EXCEPTIONS — *when necessary.* Error cannot be assigned as to the damages awarded in the court below, unless the evidence upon which the finding was made is preserved in the record.

PLEADING — *one good count will support general verdict.* It cannot be objected that one count in a declaration is faulty, if there is one good count to support the finding. Rev. Stat. 509.

PRACTICE — *referring note to clerk to compute amount due.* Where a judge of probate court acts as his own clerk, it is not necessary to refer a note on which action is brought to the clerk to compute the amount due thereon.

MISNOMER — *omission of word "junior" in record of judgment.* The word "junior" is no part of a name, and where a plaintiff in the summons and declaration affixed the letters "jr." to his name, the omission of those letters in the record of judgment is immaterial.

Error to Probate Court, Arapahoe County.

Messrs. MILLER & MARKHAM, for plaintiff in error.

Mr. E. L. SMITH, for defendant in error.

BELFORD, J. This was an action of assumpsit instituted in the probate court of Arapahoe county on the 28th day of December, 1867, on a promissory note executed by Loveland to Cook & Co., and by them duly assigned to Sears. The summons was issued on the same day, and the return of the sheriff shows that it was served on the 29th of December, 1867. At the February term, 1868, of that court, judgment was rendered by default against Loveland, for $1,650.50. This writ of error was sued out to reverse this judgment and a supersedeas was granted. At the present term of this court the defendant in error, by his attorney, filed his affidavit and also that of Richard Sopris, the sheriff, who served the summons, showing that the date of the return of service of the summons was erroneous. On this showing he was allowed to file a supplemental record. It further appears that the defendant in error appeared before the probate court and made application to have the return amended, so as to show that service was made on the 28th of December instead of the 29th. The plaintiff in error appeared by his attorney. The notice given of the application to amend was brief, but it does not appear that further time was required by plaintiff's attorney. The court, on hearing the evidence of the sheriff, allowed the return to be amended. These facts appear in the supplemental record filed at this term. The first error assigned is that the court below permitted the amendment to be made. In the case of *Moore* v. *The Peo*

ple, 3 Gilm. 153, amendments of this kind are regarded as matters of course and that no resistance can be made to such application. Should the sheriff make a false return he is responsible for the consequences. *Morris* v. *Trustees, etc.*, 15 Ill. 269; 33 id. 269; 53 id. 323.

The next error assigned is, that the judgment is in excess of the amount of the note. There is no bill of exceptions here containing the note and we can make no computation to ascertain whether such be the fact.

It is objected that there is one bad count in the declaration and that the finding of the court was a general one. It is sufficient to say, there is one good count and that will support a general finding.

The next objection is, that the probate judge did not refer the note to the clerk to make assessment of damages. The probate judge filled both offices. If it were necessary to refer it to the clerk, in this case, it would be handing the note by Jacob Downing, judge, to Jacob Downing, clerk, a ceremony not calculated to especially advance the spirit of justice.

The next objection is, that Sears is described in the pleadings and summons as Jasper P. Sears, Jr., and that the judgment is rendered in favor of Jasper P. Sears, omitting the letters "Jr." The word "junior" is no part of a name, but is merely descriptive of the person; and is usually adopted to designate the son, when the father bears the same christian name, as well as family name. *Padgett* v. *Lawrence*, 10 Paige, 170. The omission to add the word "junior" to Sears' name in the judgment can cut no figure, as the judgment recites that "said plaintiff do have," etc. This shows in whose favor the judgment was rendered.

We are unable to find any error in this record.

The judgment below is affirmed at the cost of the plaintiff in error.

Affirmed.

1	436
3	374
8	573
8	582
10	212
1	436
13	522
1	436
17	187
1	436
19	421
1	436
21	432
22	67
22	82
1	436
23	8

HILL v. THE PEOPLE.

INDICTMENT *for deliberate and premeditated homicide.* An indictment for murder in the common-law form is sufficient to support a conviction for deliberate or premeditated killing under the act of 1870. (8 Sess. 70.)

The words "malice aforethought" in the indictment are co-extensive in meaning with the words "deliberate and premeditated," and a charge that a homicide was committed with malice aforethought, comprehends a case of deliberate and premeditated killing.

CONSTRUCTION *of the act of* 1870 *relating to homicide.* The words "deliberate and premeditated" in the act of 1870, relating to homicide, refer to the intention of the accused at the time of the killing.

INTENTION *is matter of fact to be proved.* Under the act of 1870, the intention of the accused at the time of the killing is to be ascertained by the jury upon the evidence, and cannot be made the subject of legal presumption or inference.

INTENTION —*presumption of fact.* The intention of the accused may be inferred from the circumstances attending the homicide, and is therefore the subject of a presumption of fact.

Whether the intention be shown by evidence of antecedent menaces, former grudges, lying in wait, the means employed to effect the homicide or any other circumstance, the evidence is to be submitted to the jury to find the fact under the direction of the law.

A man shall be presumed to intend that which he voluntarily does, and an intention to take life is shown by the use of a deadly weapon.

So, also, if after a quarrel with deceased the prisoner went away and armed himself, and returned to the scene of the combat, intending to renew the altercation and quarrel with deceased, or to place himself in the presence of deceased with the purpose to provoke deceased to renew such quarrel and in such quarrel to make use of the pistol in repelling the assault of deceased, the intention of the prisoner to take the life of deceased is shown.

INSTRUCTION *as to presumption of intent.* It is the duty of the court to draw the attention of the jury to the points in the case and to presumptions of fact, which the law authorizes them to deduce from the evidence.

And in the present case, it was the duty of the court to lay before the jury the presumption of fact respecting the intention of the accused, and it was the duty of the jury to yield to its force and conclusiveness.

The jury should, however, be told that the presumption is to be drawn by them, and does not arise by implication of law.

An instruction, by which the jury were probably led to believe that they were relieved from considering the intention of the accused as a fact arising in the case, is erroneous.

This rule is not applicable to the ordinary inference of malice, which arises upon proof of killing, but to cases of deliberate or premeditated homicide, under the act of 1870.

REASONABLE DOUBT *in cases of homicide.* In a criminal cause, where the defense is based upon the facts and circumstances growing out of the charge itself, the burden of proof remains on the government throughout, to satisfy the jury of the guilt of the defendant.

In such case it is error to charge the jury that circumstances of mitigation, justification or excuse, must be established by a fair preponderance of testimony, and that doubt as to whether the killing was in heat of blood or with malice, would not be sufficient to acquit of the charge of murder.

Error to District Court, Arapahoe County.

THE indictment was in the common-law form for murder. At the trial, James Whitsell testified: That an altercation occurred between the prisoner and the deceased, Elija Williams, at a saloon in Denver, on the evening of the 15th of July, in which harsh words were used but no blows were struck; the prisoner went away and returned after an absence of half or three quarters of an hour with a pistol; that prisoner said to deceased, "you d——d black s—n of a b——ch, I am ready for you now;" that one George Lyon seized Hill, and a struggle ensued in which deceased participated, and the contending parties passed into a back room, where the shooting took place. Witness did not see the shooting; he testified that the deceased was not armed.

Thomas J. Martin gave the following account of the second altercation between prisoner and deceased. When Hill came in I heard him say to Elije, "You've called me a black s—n of a b——h," and Elije says "Yes, and what are you going to do about it;" Hill says to Williams, "If you don't take it back I'll hurt you;" Williams jumped up from his seat and started towards Hill; Hill drew a pistol from his coat pocket and says to Elije, "If you don't stay back I'll hurt you;" George Lyon caught Hill by this time and pushed him into the billiard room, drew the door to between him and Williams, and Mr. Thompson catched Williams in the opposite room. Elije pulled Thompson loose from him and jerked the door open; George Lyon says to Elije, "Why don't you go away and let him alone;" George still had Hill, holding him, and Elije still made way toward Hill, and George let go Hill and started toward bar-room to

call the proprietor of the house; before either of 'em got back from bar-room Hill fired a shot; in course of a minute or so after the shot was fired Williams clutched Hill, and they tusseled a minute or so, and Thompson tried to part 'em; finally, either he parted 'em or Williams let go, I ain't certain which, and walked off from him. He then sat down on the floor first, then he laid down on flat of his back; that is, Williams; he said in a minute or so after he laid down, "Who done it?" and immediately died; after they were separated, Hill immediately left the room and went out at the back door; Hill hit Williams when he shot; the shot hit Williams, and I believe it hit him in the point of the heart, I am not certain; I didn't examine Williams; he died three or five minutes after the shot; I believe Williams wasn't hurt any other way than by the shot; I don't know, and saw pistol which Hill had; it was a smallish seven-shooter; this shooting occurred in Arapahoe county, I believe, Colorado territory.

Harrison Bozier testified: That prisoner said to deceased, when he returned with the pistol: "You d——m s—n of a b——h, I am here;" that deceased then started toward prisoner, and a struggle ensued, during which the fatal shot was fired.

George Lyon testified: That he took the prisoner into the back room and fastened the door, and that deceased broke through the door and said, "Where is the d——d nigger; I will kill him." Prisoner told deceased to keep away; deceased then sprang at prisoner, and prisoner fired the shot.

Ira Thompson testified: That when prisoner returned, deceased said to him, "Hill, you back here;" prisoner said, "I don't want you to speak to me, you called me a s—n of a b——h, didn't you;" deceased said "Yes, what are you going to do about it;" prisoner said deceased was a s—n of a b——h; deceased rose from his seat, jumped on the top of the table and said, "G—d d——n you, I will kill you;" witness said, "Williams, don't hit that man;" deceased said, "G—d d——n the nigger, I will kill him." Lyon then

took prisoner out and witness caught hold of deceased; deceased broke away from him and went into back room; a struggle followed between prisoner and deceased, during which deceased forced prisoner against the wall, and raised his hand to strike him, when the prisoner fired his pistol.

The testimony was voluminous, and it is unnecessary to insert all of it. Sufficient has been stated to show the principal points.

The charge to the jury was as follows:

If the homicide charged in the indictment has been established by the evidence to have been committed by the prisoner, the law in the first instance presumes that such killing was malicious in such sense as to hold the prisoner guilty of the crime of murder. The burden of showing circumstances of mitigation, justification or excuse is upon the prisoner, unless such circumstance sufficiently appears in the evidence on the part of the people.

If the jury find the prisoner guilty of murder, then they must also consider and find whether such murder was or was not premeditated.

If the jury believe, from the evidence, that prisoner and deceased, shortly prior to the occasion of the killing, had an altercation or controversy in which deceased used words of reproach or threats toward prisoner; that prisoner thereupon went away from deceased and returned presently armed with a pistol, intending to renew the altercation and quarrel with deceased, or to place himself in the presence of deceased with the purpose to provoke deceased to renew such quarrel, and in such quarrel to make use of the pistol in repelling the assault of deceased in case deceased should assault him; and that thereupon the prisoner returning with either such purposes, the altercation was renewed either by prisoner or deceased, and that an assault and struggle followed, and that the shot whereby deceased came to his end was fired by prisoner during such struggle, then the jury ought to find prisoner guilty of premeditated murder, without reference to who gave the first offense or was the aggressor in that

particular occasion, and even though they also believe from the evidence that prisoner was in danger of life at the time of the shot fired. The arming and returning in such case raises a presumption of a deliberate purpose to kill, and the law permits no man to take life even in defense of his own life in a quarrel which he himself has provoked. And if the meeting of the prisoner and deceased upon the occasion of the homicide was but casual and not premeditated by prisoner, yet if prisoner, at such meeting, before any advance by deceased toward him, or any assault offered by deceased, made show of firearms, accompanying such exhibition by words of threatening toward deceased, then the jury will be justified in regarding the prisoner as the first aggressor, and as having provoked the assault of Williams which ensued, but in such case the jury should find the prisoner guilty merely, and not guilty of murder with premeditation. But if the jury find from evidence that the meeting and altercation of prisoner and deceased, upon the occasion of the shooting, was not premeditated by defendant, as supposed by the foregoing instruction; that the defendant, before the killing, attempted in good faith to evade the assault of deceased; that, by reason of the fierceness of the assault, the prisoner, taking into account the relative strength and activity of himself and deceased, and the previous threats, if any, made by deceased, was justified in believing that he could not escape such assault, and that from such assault he was in danger of life or limb or great bodily harm, then prisoner was justified in taking the life of deceased to prevent such injury.

Prisoner was justified in believing himself unable to evade the assault of deceased, if a man of reasonable firmness placed in the same circumstances would have indulged the same belief.

It is not necessary to justify the homicide as done in self defense, that defendant should show that he was in actual danger of life or limb, or could not have escaped the assault of deceased; it is sufficient if, under all the circumstances

then existing, a man of reasonable prudence and firmness would so have believed.

After the jury had retired they were recalled, and an instruction not here recited was withdrawn from the consideration of the jury by the court. The court then proceeded to instruct the jury further, as follows:

That the law, in the first instance, presumes every accused person innocent of the crime charged, but if the crime charged be murder, and if the killing be proven, then a presumption arises that said killing was malicious. The law, however, makes no presumption from the fact of the killing, that such killing was deliberate, but requires the deliberation of the accused to be proven beyond a reasonable doubt before he can be found guilty of premeditated murder. But the presumption of malice which arises from the fact of the killing, devolves upon the accused the burden of showing to the satisfaction of the trial jury all circumstances of mitigation, excuse or justification, unless such circumstances be shown in the prosecution, and unless upon consideration of all the evidence, both on the part of the people and the prisoner, it appears by a fair preponderance of proof that the killing was done in lawful self-defense upon apparent necessity in a quarrel not provoked by accused; they ought not to acquit, nor ought they to find guilty of manslaughter and not guilty of murder, unless by a like preponderance of proof it appears that the killing was done in the sudden heat of passion and not of malice aforethought.

It will not suffice to acquit the defendant, that the jury are in doubt whether the killing was or was not done in self-defense, or was or was not done in a quarrel unprovoked by accused. Nor will it suffice to reduce the killing to manslaughter, that the jury are in doubt whether such killing was of malice aforethought or in the sudden heat of passion and without malice.

The distinction between murder and manslaughter is as follows: *Murder* is an unlawful killing with malice aforethought, express or implied. *Express malice* is a deliberate intention to take life, and may be inferred from external

circumstances, or the conduct, actions and words of the party accused, at or about the time of the homicide, the weapon used, and the manner of the killing. *Implied malice* is that malice which is inferred by the law from the fact of homicide, where no considerable provocation appears, or the circumstances of the killing show an abandoned and malignant heart. *Manslaughter* is an unlawful killing without malice, express or implied, and without any mixture of deliberation whatever. To reduce a homicide from murder to manslaughter, it must be shown by the person accused thereof (unless shown by the prosecution) to have been upon a sudden heat of passion, and upon a provocation apparently sufficient to make the passion irresistible, or it must be shown to have been done involuntarily in the commission of a lawful act, without due caution and circumspection.

The court further instructs, that the instruction that the jury "ought or ought not," upon a supposed state of facts, to find, for or against the accused, imports that the state of facts, supposed by the instruction, does or does not warrant the finding, which the jury are thereby told they ought or ought not to make, and that a finding in violation of such instruction will be deemed in law erroneous.

A "presumption" is an inference or conclusion from certain premises; presumptions are either conclusive or disputable; conclusive presumptions cannot be overcome by evidence; disputable presumptions may. The presumption of innocence in criminal cases is a disputable presumption, so, also, is the presumption of malice, which the law raises from the fact of a homicide proven. This latter presumption, as before stated, can only be overcome by a fair preponderance of testimony.

The jury found the defendant guilty of premeditated murder.

Section 36 of the criminal code, referred to in the opinion of the court, is as follows:

"The killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the

homicide, will devolve on the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide."

Section 1, of the act of 1870, is as follows: "That section 20 of said chapter 22 of the Revised Statutes of Colorado territory shall be hereafter construed so that the death penalty for the crime of murder shall not be ordered to be inflicted by the courts of the territory, unless the jury trying the case shall, in their verdict of guilty, also indicate that the killing was deliberate or premeditated, or was done in the perpetration, or attempt to perpetrate, some felony."

Messrs. BROWN & PUTNAM, for plaintiff in error.

Mr. M. A. ROGERS, district attorney.

Mr. Justice WELLS dissented from so much of the opinion as relates to the effect to be given to section 36 of the Criminal Code.

HALLETT, C. J. The act of 1870, which provides that the crime of murder shall not be capitally punished, unless the jury trying the case shall indicate in their verdict that the killing was deliberate or premeditated or done in the perpetration or attempt to perpetrate a felony, is peculiar in form, but in many respects substantially the same as the law of several States upon the same subject.

As early as 1794, in Pennsylvania, it was enacted that:

"All murder which shall be perpetrated by means of poison or lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree; and the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree."

In substance, if not in form, this statute has been adopted in other States, and its meaning and effect are now pretty well understood. Our legislature, with less method, perhaps, but with quite as much certainty, has raised a punitive distinction between murder committed with deliberation or premeditation, or in the perpetration or attempt to perpetrate a felony, and other murders, and this distinction, so far as relates to deliberate or premeditated killing, is substantially the same as that which, by the Pennsylvania act, separates the first and second degrees of murder. In the Pennsylvania act, and in our own, certain distinctions are mentioned for the purpose of limiting the death penalty to cases falling within them, but nothing is added to or taken from the common-law definition of murder. And this brings into view the first question presented in this record, which is the sufficiency of an indictment in the common-law form to support a conviction for premeditated murder. It is conceded that the crime of which plaintiff in error has been convicted must be set out in the indictment, and if the words "malice aforethought" are not co-extensive in meaning with "deliberation and premeditation" this has not been done. If these words had not acquired a technical meaning in the law, probably no doubt would exist upon this point. We would then accept them in their primary sense, which is rather more comprehensive than "deliberation and premeditation," inasmuch as the latter words do not necessarily imply wickedness of purpose or evil design. Said Lord Coke (3 Inst. 51): "Malice prepensed is when one compasseth to kill, wound or beat another, and doth it *sedato animo*. This is said in law to be malice aforethought, *prepensed*, *malitia precogitata*."

The meaning of these words has been greatly amplified since the days of Coke, for, in the *Webster case*, 5 Cush. 304, it was said to include "not only anger, hatred and revenge, but every other unlawful and unjustifiable motive." But it is no objection to say that the words are more comprehensive than the words of the statute, if they are of equivalent meaning, because the whole must include all of

its parts. Before the statute of 1870, it was never doubted that a formed design and deliberate purpose to kill was provable under the averment of malice aforethought, and there is nothing in the statute to change the rule on this subject. In the *Webster case*, 5 Cush. 316, it was said that malice aforethought does not imply deliberation or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent.

They do not *necessarily* imply deliberation or premeditation, because they have acquired a technical meaning in the law far beyond their primary and popular sense, and may be, and often are, taken to mean something other than premeditation and deliberation. The mother who exposed her child in the garden, and the workman who cast timber into the crowded street, are instances given in the books of criminal carelessness which the law denominates malice aforethought; but a homicide effected in either of these ways would not be regarded as deliberate or premeditated. Therefore the words of the statute, although not co-extensive in meaning with the words of the indictment, are, nevertheless, synonymous with them, and there can be no reason for using the former rather than the latter. Whart. Crim. L., § 1115.

The doctrine is not to be extended, however, beyond the reason which supports it, and, therefore, if the fact to be proved is not set out in the indictment no evidence can be received concerning it. We doubt the soundness of those decisions in which it is held that proof of a homicide committed in the perpetration, or in the attempt to perpetrate a felony, may be made under the ordinary common-law indictment, for these facts are not averred in such an indictment. 2 Bishop's Crim. Proc., § 562, *et seq.*

Passing from the indictment, which we accept as sufficient, no argument will be required to show that the words "deliberate and premeditated" refer to the specific intent with which the act is done. They are used to denote the action of the mind, and involve the idea of thought and reflection.

A deliberate or premeditated act is one which is done upon a formed design, and with a direct purpose to accomplish it.

The act and intention must coincide, but, as to this coincidence, it was held in Pennsylvania to be sufficient that the accused intended to take life, although the act fell upon one not within the intention. *Hopkins* v. *Com.*, 50 Penn. 10. Mr. Wharton says (Whart. C. L., § 1084):

"The distinctive peculiarity attached by the statutes to murder in the first degree, however, is that it must necessarily be accompanied with a premeditated intention to take life. The 'killing' must be '*premeditated.*' Whenever, then, in cases of deliberate homicide, there is a specific intention to take life, the offense, if consummated, is murder in the first degree; if there is *not* a specific intention to take life, it is murder in the second degree."

Accepting this distinction, not as establishing degrees, but as one which regulates the punishment under our statute, we will inquire in what manner the intention to take life is to be ascertained. And here it will be observed that the act of 1870, in terms, refers this question to the jury, the language of the act being that the jury shall indicate in their verdict that the killing was deliberate or premeditated. Juries act upon evidence, and hence we may conclude that the intention is matter of fact to be found by the jury upon the evidence. In support of this view, I find it laid down in *Roberts* v. *The People*, 19 Mich. 414, as a general rule, to which there are few if any exceptions, "that when a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found by the jury as matter of fact before a conviction can be had."

This is the rule in the States where degrees in the crime of murder are recognized, and deliberate and premeditated homicide is assigned to the first. *People* v. *Potter*, 5 Mich. 1; *Whitford* v. *Com.*, 6 Randolph, 722; *Bivins* v. *State*, 6 Eng. 455; *State* v. *Gillick*, 7 Iowa, 287; *State* v. *Dowd*, 19 Conn. 387; *People* v. *Sanchez*, 24 Cal. 17.

At common law, and under our statute, the presumption of malice arises upon proof of the killing, but the statute of 1870 distinguishes the cases characterized by deliberation and premeditation from others, and declares that the jury shall indicate the existence of such distinguishing characteristics. Of the correctness of the general proposition, that the intention with which the killing is done is matter for the consideration of the jury, there appears to be no doubt, and it would seem that this can never be made the subject of legal inference or presumption; and yet in some of the cases homicide, by means of a deadly weapon, appears to have been regarded as an exception to the rule, and Mr. Greenleaf states that the intent to murder is conclusively inferred from the deliberate use of such weapon. 1 Greenl. Ev., § 18.

A man shall be presumed to intend that which he voluntarily does, and where the act is necessarily destructive of life, it would be absurd to say that the actor did not intend to produce death. So, if a person deliberately use a deadly weapon in a manner likely to produce harm, upon every principle by which we may judge of the motives of men, we must say that he intends to destroy life. But we determine this psychological fact upon our experience of the operations of the mind; and, therefore, I think this is a natural presumption as distinguished from a legal presumption. It is an inference, approved by reason of such an infallible nature that the law recognizes and enforces it. Of natural presumptions Mr. Starkie says (3 Stark. Ev. 1245): "Many presumptions of this class are recognized by the law, and, therefore, in one sense, may be termed legal presumptions, which still, unless some degree of technical force and weight be given them beyond their mere natural operation, are properly to be ranked in this class. Recent possession of stolen goods, on a trial for larceny, is recognized by the law as affording a presumption of guilt; and, therefore, in one sense, is a presumption of law; but it is still, in effect, a mere natural presumption, for, although the circumstance may weigh

greatly with a jury, it is to operate solely by its own natural force, for a jury are not to convict on this or any other charge unless they be actually convinced in their consciences of the truth of the fact."

So, also, in Best on Presumptions, 45, mention is made of presumptions of fact recognized by law, first among which are those where the inference is one which common sense would have made for itself. I think that we may regard the presumption arising from the use of a deadly weapon, as of this class, so strong that it has often been mistaken for a presumption of law. "We find the same presumption spoken of by judges, sometimes as a presumption of law, sometimes as a presumption of fact; sometimes as a presumption which juries should be advised to make, sometimes as one which it was obligatory on them to make," etc. Best on Presumptions, 44.

The statute has not declared that homicide, effected by means of a deadly weapon, shall be punished with death, but deliberate or premeditated homicide is so punishable; therefore, the ultimate point which the evidence must extend to and establish, is not the use of a deadly weapon, but the deliberation or premeditation with which the fatal act is done, and whether the intention is shown by evidence of antecedent menaces, former grudges, lying in wait, the means employed to effect the homicide, or any other circumstances which may give assurance of it, I think that it is to be submitted to the jury to find the fact under the direction of the law.

How far the law will go in supporting, before the jury, a presumption of fact which it recognizes and enforces, is a question of some difficulty. The rule is given in Best on Presumptions, 48, as follows: "The terms in which presumptions of fact and mixed presumptions should be brought under the consideration of juries, by the presiding judge, depend on their weight, either natural or technical; when the presumption is one which the policy of law and ends of justice require to be made, such as the existence of moduses and other incorporeal rights, from unin-

terrupted usage, the jury should be told that they *ought* to make the presumption, unless some evidence be given to the contrary; it should not be put to them as a matter for their discretion, and the same rule seems to apply where the presumption is one of much natural weight and frequent occurrence; as where larceny is inferred from the recent possession of stolen property, etc. In the case of presumptions of a less stringent nature, however, such a direction would be improper; and, perhaps, the best general rule is, that the jury should be advised or *recommended* to make the presumption."

To advise or recommend a jury to make a presumption, must, in many cases, be very nearly akin to an expression of opinion upon the weight of evidence, which, according to the construction placed upon our statute governing charges to juries, is prohibited by it.

The doctrine of presumption grew up under the common law which enjoined upon courts the duty of analyzing the evidence, and commenting upon the bearings, tendency and force of the particular facts, and the comparative weight and force of conflicting evidence. 1 Stark. Ev. 73.

The object of the statute in providing that courts should charge juries as to the law of the case only was to preserve the distinction between the functions of each, which, however commendable in itself, must not be carried so far as to defeat the administration of the law.

It is still the duty, as it always has been the practice, of our courts, to draw the attention of the jury to the points arising in the case, and to the presumptions of fact, which the law authorizes them to deduce from the evidence. To guide the deliberations of a jury to a correct conclusion, without assuming their functions, is a delicate and arduous duty, which must be faithfully and intelligently performed by the courts in all cases.

A portion of the charge to the jury in this case was the following:

"If the jury believe, from the evidence, that prisoner and deceased, shortly prior to the occasion of the killing, had

an altercation or controversy in which deceased used words of reproach or threats toward prisoner, that prisoner thereupon went away from deceased and returned, presently, armed with a pistol, intending to renew the altercation and quarrel with deceased, or to place himself in the presence of deceased with the purpose to provoke deceased to renew such quarrel, and, in such quarrel, to make use of the pistol in repelling the assault of deceased in case deceased should assault him; and thereupon, the prisoner returning with either such purposes, the altercation was renewed either by prisoner or deceased, and that an assault and struggle followed, and that the shot, whereby deceased came to his end, was fired by prisoner during such struggle, then the jury ought to find prisoner guilty of premeditated murder, without reference to who gave the first offense or was the aggressor on that particular occasion, and even though they also believe, from the evidence, that prisoner was in danger of life at the time of the shot fired. The arming and returning, in such case, raises a presumption of a deliberate purpose to kill, and the law permits no man to take life even in defense of his own life in a quarrel which he himself has provoked."

It will be observed that the intention of the accused to take life is not mentioned in this part of the charge as a fact essential to guilt, except as a presumption arising out of the circumstances that the accused armed himself and returned to the scene of the tragedy after the first interview. Elsewhere the jury were told that they were to find premeditation; but as this fact is, in this portion of the charge, distinctly predicated upon the arming and returning, it is not probable that the jury accepted the former as a modification of this statement. In the circumstances named by the court, and in the character of the weapon used, there was plenary proof of the intention of the accused to take life, but, as I have attempted to show, this was for the consideration of the jury. It was the duty of the court to lay before the jury the presumption of fact as to the intention of the accused arising upon these circumstances, and it was

the duty of the jury to yield to its force and conclusiveness. I think that the manner in which this duty was performed by the court is open to the objection, that the jury probably understood that they were relieved from the consideration of the intention of the accused as a fact in the case. It cannot be objected that the premeditation is made the subject of inference and presumption, because, usually, this fact cannot be proved in any other way. 2 Stark. Ev. 739.

But they should have been told that this presumption was to be drawn by them, and did not arise by implication of law. *Graves* v. *The State*, 12 Wis. 593; *Methard* v. *The State*, 19 Ohio, 367.

I do not refer to the ordinary inference of malice, which, by the common law and our statute, arises upon proof of the killing, but to the premeditation and deliberation mentioned in the act of 1870, which by that act are directly submitted to the decision of the jury. In all cases of intentional homicide malice is implied, and so it must have been here if the jury could find nothing to mitigate the offense. But premeditation and deliberation is the subject of proof of which the government assumes the burden, and of this I think the jury were not sufficiently informed.

Another part of the charge presents a question which has been the subject of much learned discussion in the courts of this country, and appears to be still unsettled, although I think the weight of authority is opposed to the views of the district court. The court charged that circumstances of mitigation, justification or excuse must be established by a fair preponderance of testimony, and that doubt as to whether the killing was in heat of blood or with malice, would not be sufficient to acquit of the charge of murder.

The doctrine of reasonable doubt was, however, applied to the crime of which the accused was convicted, and if the case were not to be tried anew, it might not be necessary to notice that portion of the charge which relates to the evidence required of the accused. The charge is grounded upon section 36 of the Criminal Code, which, after proof of the killing by the government, in terms, casts upon the

accused the burden of proving circumstances of mitigation, justification or excuse, unless such circumstances appear in the evidence against him. The law of homicide, as found in the Criminal Code, was evidently drawn from the common law, and probably this section was intended to preserve the common-law rule respecting malice in cases of homicide. I think that the language accords with that used by the common-law writers upon the same subject, sufficiently to warrant this inference. At all events it is noticeable that, by the statute as well as by the common law, if the circumstances of mitigation, justification or excuse are apparent in the testimony of the government, the accused is entitled to the benefit of the presumption of innocence, which demands that his guilt shall be made to appear beyond a reasonable doubt. But it is said that, if these circumstances do not so appear, he must establish them by testimony outweighing that of the government. Now, the circumstances attending an act give character to it, inasmuch as they evince the intention of the actor at the time of the fact. Section 2, Criminal Code. Usually, the proof of the killing will disclose the circumstances attending it, and the character of the crime is demonstrated by the same evidence which establishes it. But if the government is able to make proof of the homicide, without more, and the accused is therefore compelled to give evidence of the attending circumstances, it seems to me that he ought not to be placed under greater hardship or subjected to a more rigorous rule than would have been applied, if the government had frankly presented the whole case to the jury.

The argument in the *York case*, 9 Met. 93, which is difficult to answer or to accept, proceeds no further than the case of homicide, without further proof on the part of the government, and it appears to me that there are unanswerable objections to the doctrine thus limited. It often happens, as in this case, that several witnesses of a criminal act give different accounts of it and some of the testimony is more favorable to the accused than the remainder.

The government usually selects the testimony which

tends most strongly to conviction, while the accused relies upon that which is most favorable to himself. Shall it be said that in such case the testimony for the defense must outweigh the testimony of the prosecution?

The testimony of the accused may be supplemented by that of the government, or it may be sufficient to balance the opposing testimony; but if it is sufficient to raise a reasonable doubt of the guilt of the defendant in the minds of the jury, the presumption of innocence will operate in his favor. "However the rule may be in cases where the defendant sets up, in answer to a criminal charge, some separate, distinct and independent fact or series of facts, not immediately connected with, and growing out of, the transaction on which the criminal charge is founded, there can be no doubt that, in a case like the present, the burden of proof remains on the government throughout to satisfy the jury of the guilt of the defendant. It appears by the evidence, as stated in the bill of exceptions, that the justification upon which the defendant relied was disclosed partly by the testimony introduced by the government and in part by evidence offered by the defendant, and that it related to and grew out of the transaction or *res gesta*, which constituted the alleged criminal act." *McKee* v. *Com.*, 1 Ben. L. C.C. 297, and note; *State* v. *McClure*, 5 Nev. 132; *State* v. *Bartlett*, 43 N. H. 224; *State* v. *Flye*, 26 Me. 316.

If we except the statute in its common-law relations where the presumption of malice always encountered the presumption of innocence we shall not be able to approve the charge of the court below. Where the defense is based upon the facts and circumstances growing out of the charge itself, we cannot indulge the presumption of innocence and, at the same time, require the accused to establish those facts and circumstances by preponderance of testimony, because less evidence may be sufficient to engender a reasonable doubt of guilt.

In a case of less consequence we should hesitate to reverse a judgment for misdirection to the jury alone, but we cannot assume the grave responsibility of determining the

correctness of the verdict upon the evidence in a capital case. The judgment is, therefore, reversed and the cause remanded with directions to the district court to award a new trial.

Reversed.

---

1 451
2 605
3 287

1 454
15 47

1 454
17 75

1 454
6a 142

1 454
9a 46

DOANE et al. v. GLENN et al.

PRACTICE — *amending record after judgment — upon whom to serve notice.* Where an order allowing a bill of exceptions to be filed in vacation was omitted from the record, notice of an application to amend the record in that particular may be served upon the attorneys who appeared for the opposing party at the trial of the cause.

AMENDMENT OF RECORD *at a subsequent term.* Where an order allowing a bill of exceptions to be filed in vacation was omitted from the record by mistake of the clerk, the court may, at a subsequent term, allow the record to be amended by inserting such order *nunc pro tunc.*

Error to District Court, Arapahoe County.

UPON motion to strike the bill of exceptions from the record.

Messrs. FRANCE & ROGERS, in support of the motion.

Messrs. CHARLES & ELBERT, *contra.*

BELFORD, J. The defendants in error move to strike from the record the bill of exceptions, and rest the motion on two grounds.

It appears that at the June term of the district court the judgment in this case was entered up. The plaintiffs in error were allowed thirty days to prepare a record and file bond, and sixty days to settle their bill of exceptions. By the inadvertence of the clerk the order made by the judge in reference to filing the bill of exceptions was omitted from the record. This order was made at the last hour of the last session of the term, and the omission was not discovered until some weeks after. At the ensuing term of the court the plaintiffs in error, having given notice to the at-

torneys of the defendants, made their application to the court to have this omission supplied. This application was founded upon affidavit of Doane's attorneys, which set up the facts that the order had been made by the judge and omitted from the record by the clerk. The judge, acting on his own recollection of what had occurred, together with what appeared from the affidavits, allowed the omission to be supplied.

It is claimed by defendant's counsel that the notice above referred to was insufficient because the same was served on the attorneys and not on the parties. That final judgment having been entered at the July term, their connection with the case by operation of law had ceased, and that the amendment of the record must be regarded as having been made without notice, and therefore not valid or binding.

We find ourselves unable to sanction this claim. It is a noticeable fact that the same counsel who appeared for the defendants below appear for them here. There seems to be no breach in the line or continuity of employment.

While it is generally true that the power of the attorney, under his general warrant, expires when judgment is rendered, yet it is equally true that the power of the attorney will be retained even after the entry of final judgment on the record, and beyond the purpose of merely superintending the execution of the same. If a writ of error be brought against his client, it has long been the practice to require that he should be served with notice. 2 Sel. Pr. 365. So the entering of final judgment by the defendant's attorney may be irregular. What objection is there in such case to serving him with notice of a motion to set it aside, and to call upon him to defend and make it good? It is his business at least to see that a regular judgment in favor of his client should be perfected and sustained when the court has awarded in his favor. Having conducted the suit, he is best able to resist all attacks upon the judgment. Indeed, his own regularity is generally drawn in question by the proceeding. For a similar reason he is the proper person to be served with notice when the judgment or any

other proceeding in which he has participated is sought to be set aside or questioned on the ground of merits, as is done in this case. We think that the case of *Lusk* v. *Hastings*, 1 Hill, 656, is decisive of this point; and if it were not we would still be induced to hold that the duty of an attorney does not cease to his client so long as the judgment obtained by him is menaced by further judicial action.

It is next objected that the court could not, at a subsequent term, amend its records.

In *Alhers* v. *Whitney*, 1 Story, 310, Mr. Justice STORY says: "It is plain that at the common law no judgment was amendable after the term at which it was entered; and amendments could be made in the process, pleadings and proceedings only while the cause stood in paper, and before judgment. The authority to amend then, even in England, in cases of this sort, is dependent upon, and limited by, statute. Mr. Tidd has laid this down as the clear doctrine of the courts in all cases of ordinary suits in English courts of practice. Judgments and records are there never allowed to be amended except, in the first place, where the case is within the reach of some statute, or, in the next place, when there is something to amend by; that is, when there is some memorial, paper or other minute of the transactions in the case from which what actually took place in the prior proceedings can be clearly ascertained and known." Tidd, 713, 714.

We acknowledge the force of this doctrine, and question the right of allowing a judge to alter a judgment after the close of the term, when there is nothing to amend by; and he assumes to do it on the ground that the judgment, as entered, does not express the intention of his mind at the time it was entered. To tolerate a practice of this kind might give a license to the judge to carry the records of his court, and the ultimate rights of parties, about the country in his head. Yet, notwithstanding what has been said above, the doctrine in this country, in reference to amendments of records, may be said to have crystalized into the

following legal propositions, namely: That any error or defect in a record which occurs through the act or omission of the clerk of the court in entering, or failing to enter, of record its judgments or proceedings, and is not an error in the express judgment pronounced by the court in the exercise of its judicial discretion, is a mere *clerical error* and amendable, no matter in how important a part of the record it may be; and when the error or defect is in respect to the entry of some judgment, order, decree or proceeding to which one of the parties in the cause was of right entitled, as a matter of course, according to law and established practice of the court, it will sometimes be presumed to have occurred through the misprison of the clerk, and will always be amendable if, from other parts of the record, or from other convincing and satisfactory proofs, it can be clearly ascertained what judgment, order or decree the party was entitled to; nor is it necessary, so far as clerical errors go, that the amendment should be made during the term at which judgment is rendered. In the case of *Shaw* v. *Benkard* it was held, that, when an entry of default was not made, it is amendable in the court below, and, on appeal, the amendment will be presumed to have been made. 10 Ind. 227. So in *Burrow* v. *Blair*, 12 Ind. 371, a clerical error, whereby a judgment for foreclosure and the order of sale, and the execution covered land at the time not included in the mortgage, was allowed to be amended.

In the case of *Limerick petitioners*, 18 Mann. R., the court say: "When a defect in a record is occasioned by an omission of the court to render the proper judgment, or to come to a conclusion upon the whole matter embraced in the cause, such defect, arising out of an incorrect or a want of judicial action, cannot be amended after the term has closed and the cause is no longer *sub judice*. But, if the court have performed its whole duty correctly, and the recording officer has erred in making up a proper or full record, the court may, in its discretion, cause the record at any time to be amended or corrected so as to have it declare the whole truth. Each court must necessarily be the

judge of what it has decided and adjudged; and, when it orders an amendment of the record, the presumption of other courts must necessarily be that it does not undertake to order its clerk to record what it never had decided."

In the case of *Slicer* v. *The Bank of Pittsburgh*, 16 How. 579, it was objected that the judgment was not entered upon the minutes kept by the clerk. The court say: "But the court had the power to make the amendment, which they did make, and which removed the objection, by entering the judgment *nunc pro tunc*. This was a duty discharged by the court in the exercise of a discretion which no court can revise."

In the case of *Latshaw* v. *Steinman*, 11 Serg. & Rawle, 356, it was held that the court below might, in their discretion, amend a judgment by default, and that the appellate court would not inquire whether they had exercised their discretionary power judiciously."

In the case of *Stickdale* v. *Johnson*, 14 Iowa, 179, a motion was made in December, 1861, to strike the bill of exceptions from the record. The motion was sustained because it appeared affirmatively that the same had been signed and filed in vacation, without the consent of the appellee. At the April term of the district court, A. D. 1862, the appellant moved the court to supply an omission in the final record of said cause, so that it might be made to conform to the order of the court, made at the September term, 1861, in this, to wit: "That by consent of parties the bill of exceptions was ordered to be prepared and signed in vacation." This motion was supported by affidavits; counter affidavits were filed by the attorneys on the other side, denying, in very positive terms, that they ever assented to any such arrangement, referring to some circumstances in confirmation of their statement. The motion was overruled and an appeal taken.

The supreme court say: "The facts about which there is conflicting evidence transpired before, and in the presence of, the judge below. He is supposed to have some knowledge and recollection of the facts himself. They relate to a

supposed omission in his records, which are exclusively under his own control and keeping. It would be manifestly improper, under the circumstances and the showing made, for us to overrule his decision."

Here the court treats the subject as a matter of discretion resting with the court below, and not to be interfered with by the appellate tribunal.

In *Hudgkins* v. *Kemp*, 18 How. 530, it appears that TANEY, C. J., in vacation, ordered the clerk to enter up an appeal as of the term. An appeal had been prayed and allowed, but the clerk had failed to enter the order. When it came to the supreme court for review it was not regarded as error.

The case of *Malbeson Adams* v. *Grant's admr.*, 2 How. 279, is a strong case. There the declaration was in two counts, one as administrator, and one in the plaintiff's own right — general verdict and judgment arrested, but no *venire de novo* awarded, or judgment *non obstante veredicto*. At the second term, subsequent, and one year afterward, a motion was made to vacate the order arresting the judgment. It was sustained. And on affidavits showing what evidence had been given on the trial, the verdict was amended so as to apply it to the first count. Judgment was given on the first count, and a *nolle prosequi* entered as to the other. *Held*, on error, that there is no time absolutely fixed within which such an amendment as the one in question must be made; all that is required is that it should be within reasonable time, and when no such change of circumstances shall have intervened as may render it inconvenient or inexpedient.

That such an amendment, though usually made by reference to the judge's notes, may be had upon any other evidence equally clear and satisfactory (see the cases there cited).

Many other authorities might be cited, showing that amendments of this character are matters of discretion, but we deem it unnecessary. We see no error in the action of the court below. The motion to strike the bill of exceptions from the record must be overruled.

Motion denied.

1 460
6 549
1 460
19 484
1 460
6a 11

HOLLADAY v. DAILEY.

DOWER — *right of — not known.* In this territory a wife has no dower in the real estate of her husband. 1 Sess. 363.

MARRIED WOMEN — *power to contract.* By the act of 1861, to protect the rights of married women (1 Sess. 152), a wife may make contracts respecting her separate business and estate; beyond these limits her contracts are governed by the common law and are therefore void. She cannot warrant her husband's title to realty, or covenant for his act or default in any respect whatever.

POWER OF ATTORNEY *to convey husband's lands executed by wife.* Therefore, where husband and wife joined in a power of attorney, the attorney could do no act under the power which should in any way charge the wife's estate or bind her or those in privity with her.

DEED BY HUSBAND, *without wife, under power from both.* A deed conveying the husband's land, executed in the name of the husband only, by an attorney in fact, under a power proceeding from the husband and wife, is as effectual as if the wife had joined therein.

POWER OF ATTORNEY — *conditions imposed on attorney.* In an authority to convey lands, the principal may impose frivolous and impertinent conditions upon his attorney, and, if the conditions are merely indifferent, and not *malum prohibitum* or *malum in se*, his will shall be observed.

POWER OF ATTORNEY — *condition against public policy.* It is against public policy that land records should be incumbered by invalid conveyances purporting to be executed by persons incapable in law, and so holding out empty promises.

A power of attorney, executed by husband and wife, which confers authority to convey lands of the husband, in so far as it requires that the conveyance shall be made in the name of the wife, imposes a condition which the law will not suffer the attorney to perform.

POWER OF ATTORNEY — *illegal or void condition.* An illegal or void condition inserted in a warrant of attorney may be disregarded by the attorney.

POWER FROM HUSBAND AND WIFE *to sell husband's estate — how executed.* A power proceeding from husband and wife, as to the estate of the husband, is well executed in his name alone.

DEED *valid without acknowledgment.* A conveyance is valid between the parties thereto and those having notice thereof though not acknowledged.

In ejectment by a grantor against one who claims title under his grantee, if the execution of the deed is admitted, no question can be raised respecting the certificate of acknowledgment.

DEED — *what is sufficient signing by attorney in fact.* Where the christian name of an attorney in fact is inserted in the power of attorney and in the deed, a signature to the deed, in which the initial letter of such christian name is used, is sufficient.

Error to District Court, Arapahoe County.

THE action was ejectment, and the cause was heard upon an agreed statement of facts, as follows: 1st. That the lots mentioned in the declaration in this suit are within, and a part of, the land entered by James Hall, probate judge, etc., under an act of congress, entitled "An act for the relief of the citizens of Denver, in the territory of Colorado," approved May 28, 1864. 2d. That said land so entered was duly patented by the United States to the said James Hall, probate judge, etc., by letters patent, bearing date July 1, A. D. 1868. 3d. That, on the 11th day of August, A. D. 1865, the said James Hall, probate judge, etc., duly conveyed the said lots to the plaintiff, Ben Holladay. 4th. That the defendant, Anthony Dailey, was in the possession of the said lots at the time of the commencement of this suit. 5th. That, on the 27th day of September, A. D. 1866, Bela M. Hughes, acting as attorney in fact, for and in the name of the plaintiff, Ben Holladay, made, executed and delivered a conveyance of said lots (with others) to Richard E. Whitsitt, for a valuable consideration paid to said Hughes. 6th. That, in the execution of such last-named conveyance as attorney in fact for the plaintiff, the said Bela M. Hughes acted under and by virtue of a certain letter or power of attorney from Ben Holladay and N. A. Holladay, his wife, of the date of February 13, 1866. 7th. That, under and through said last-mentioned deed, the defendant, or those under whom he claimed to hold said lots, derive title thereto. 8th. That the genuineness of the signatures to the said power of attorney, and the said last-mentioned deed, as well as the signing of the same respectively, is hereby admitted. 9th. That the only question in dispute between the parties hereto is, the legal sufficiency of the said power of attorney from Ben Holladay and wife to Bela M. Hughes, and the deed thereunder, made from Holladay by Hughes, his attorney in fact, to Richard E. Whitsitt, to pass the legal title of the said plaintiff, Holladay, in and to said lots, to the said Whitsitt. 10th. That

the exhibits hereto annexed, marked "A" and "B" respectively, are copies of the power of attorney and of the deed last above referred to, together with the certificate of acknowledgment thereunto attached, and said copies shall stand in this stipulation for the original. 11th. The matter in controversy in suit is submitted to the court, without the intervention of the jury, either party having the privilege of submitting such a statement of points and brief of authorities as he sees fit, first furnishing the opposite party with a copy thereof. 12th. If the court be of the opinion that the deed and power of attorney herewith exhibited are sufficient to convey the legal title of Holladay to said lots to Whitsitt, then judgment is to be given for the defendant; if the court be of the opinion they are insufficient to convey said title, then judgment is to be given for the plaintiff.

The substantial parts of the power of attorney referred to are as follows:

"Know all men by these presents that we, Ben Holladay and N. A. Holladay, his wife, of the State of New York, for and in consideration of the sum of one dollar to us in hand paid, as well as other considerations us thereunto moving, have this day constituted and appointed Bela M. Hughes, of the State of Kansas, our true and lawful agent and attorney in fact for us, and in our names to sell and convey to any purchaser or purchasers for such price or prices as to him may seem best, all or any lots of ground in Denver city, Colorado, in the county of Arapahoe, in said territory, the title to which is now vested in said Ben. Holladay, * * * and the said Ben Holladay and N. A. Holladay, his wife, do hereby authorize said Hughes to proceed to sell said property on such terms as he may consider best for their interest; this power to sell said property and real estate, or any part of it, to continue until the whole of the said property or real estate is sold by their said attorney and agent, and shall extend also fully to all out lots or parcels of ground in and around the said Denver city, and it is provided that, in case of the death of either of the

said parties making this power of attorney, no further power shall be necessary to our said attorney in fact and agent, to enable him to complete conveyances for property then sold, or to proceed to sell the same or any part thereof thereafter, but he shall proceed, notwithstanding, to sell and convey said property until the same is all disposed of by him, * * * hereby ratifying and confirming all that the said Hughes may do and perform in the premises under this power of attorney to him given."

The first clause of the deed to Whitsitt was as follows: This indenture, made this 27th day of September, in the year of our Lord, eighteen hundred and sixty-six, between Ben Holladay, of the city and State of New York, by Bela M. Hughes, his duly authorized attorney in fact, party of the first part, and Richard E. Whitsitt, of the city of Denver, party of the second part, witnesseth, etc., etc. The deed was signed, "Ben Holladay, by his attorney in fact, B. M. Hughes." The certificate of acknowledgment attached to the deed was as follows: "On this twenty-ninth day of September, in the year of our Lord, one thousand eight hundred and sixty-six, before me, a notary public, in and for the county aforesaid, personally came Ben Holladay, by Bela M. Hughes, his attorney in fact, personally known to me to be the same person described in and who executed the within conveyance, and acknowledged that he freely and voluntarily executed the same as the attorney of Ben Holladay, and as the free and voluntary act and deed of the said Ben Holladay therein described."

The objections to the deed from Holladay to Whitsitt were as follows:

First. The attorney in fact deviated from his warrant of authority in making the deed in controversy; and, thereby, made a deed that was entirely unauthorized.

Second. Said deed was not acknowledged in accordance with the laws then in force in Colorado.

Third. Said deed was not subscribed by the attorney in fact, as the laws of Colorado then required.

The district court gave judgment for defendant.

HALLETT, C. J., took no part in the decision.

Mr. ALFRED SAYRE, for plaintiff in error.

Mr. B. M. HUGHES and Messrs. CHARLES & ELBERT, for defendant in error.

WELLS, J. I will consider first the question, whether the letter of attorney under which Hughes acted, or assumed to act, on the conveyance to Whitsitt, imposed as one of the conditions to the exercise of his authority, that the conveyances made in pursuance thereof should be in the names of Holladay and his wife.

This is purely a question of interpretation, and the intent of the instrument is to be derived solely from the words used therein, read in the light which the situation of the parties, so far as this appears, affords.

It is perfectly clear, as we think, that, if the attorney had united Mrs. Holladay with her husband, as grantor, on the conveyance which he assumed to execute, it could have effected no purpose, for, though the wife united in the letter of attorney, she had no dower in the lands, as it would seem was supposed; it has not been shown that she had any other estate vested or contingent upon which her conveyance could operate, and we will not presume such estate in the absence of proof thereof; neither could she have bound herself by any covenant in the conveyance, for, under the statute, as it then stood, the power of the wife to contract extended only to the sale and conveyance of her separate estate, real and personal, and to the carrying on and contracting about any trade or business conducted upon her separate account. Acts 1861, p. 152, §§ 2, 3, 10. All the contracts of a *feme covert* beyond these limits were still, as they were at common law, absolutely void. The statute did not authorize the wife to warrant her husband's title to realty or to covenant for his act or default in any respect whatever; and, in this case, the wife having no estate in the realty, which she could convey, and having no power to engage in regard to her husband's estate, it is clear that

she could not authorize another to so convey or engage for her, and the letter of attorney was, therefore, as to her, absolutely void. It was as if her name had not been in serted in it, or subscribed to it, the attorney could do no act thereunder which should in any way charge her estate, or bind her, or those in privity with her.

The conveyance which the attorney did make was quite as effectual to this, as if her name had been inserted therein, and by him, or by herself, indeed, subscribed thereto.

Nevertheless, if the husband, by the letter of attorney, has required that all conveyances thereunder shall be in the joint names of himself and the wife, then, howsoever empty and profitless the form, the attorney was not on this account merely' at liberty to disregard it. The principal, in an authority to convey lands, may, I suppose, lawfully require that the conveyance shall be upon parchment or attested by certain witnesses, or shall be by deed indented, and not otherwise, or he may impose any other frivolous and impertinent condition which caprice may suggest; and the mere vanity and ineptitude of the condition will not avoid it; for, though the law requires it not, yet the owner of the lands may; and if the condition be merely indifferent, and not either *malum prohibitum* nor *malum in se*, his will shall be observed.

But here, as I think, the condition which it is said was imposed upon the exercise of the agent's authority was not only vain, but illegal; for it is manifestly against public policy, that our land records should be incumbered by invalid conveyances, purporting to be executed by persons incapable in law, and so holding out empty promises. If such conveyances be tolerated — if one may do by another what he may not do in his own person — if the husband may, by way of condition or in any other way, authorize the attorney whom he alone has constituted to subscribe the wife's name to a deed by which she cannot be bound, inserting therein covenants and recitals which assume or purport to be hers, it may probably happen that ignorant and incautious persons will be led to purchase the estate on the faith

of the wife's supposed ability and liability to respond in damages in case of the failure of title, or on the faith of some imagined estoppel. If one may, in this manner, assume to have authorized his wife's name to be subscribed to a conveyance or covenant, I do not see why he may not exercise the same liberty with that of his neighbor. Certainly, the recognition of such a power or right will serve no good purpose, and it may breed uncertainty in titles and unprofitable litigation.

I am therefore of opinion that the construction for which the counsel for plaintiff in error has so ingeniously contended will render the letter of attorney nugatory, for, by this construction, it imposes a condition precedent, which the law will not suffer the attorney to perform, and it is said that if one grant an estate upon condition precedent which it is unlawful to perform, here, both the estate and the condition are void, for an estate can neither commence nor increase upon an unlawful condition (Shepherd's Touchstone, 132), and so I conceive is the law where a power is sought to be created upon like condition. Though, possibly, it may better be likened to a bond with condition repugnant to mere positive law, in which case it is said the condition only is void, and the bond shall stand single (2 Bl. Com. 300), but I think not.

Therefore, to effectuate the manifest purpose of the principal — namely, to convert these lands, which were at a distance from his place of residence, and so beyond his personal supervision and control, into money — and in order that the letter of attorney may not utterly fail of effect, I think we are authorized to read it as if the name of the wife were not contained therein (as in effect it is not) and as if the authority had been in terms "for me and in my name to convey," etc.

And this, though it may seem to do violence to the text of the instrument, is warranted by authority; for it is said that: "If divers join in a deed and some are able, and some are not able, this shall be said to be his deed alone that is able" (Shepherd's Touchstone, 81), that is to say, the

words of grant, confirmation and the like, which are written in the plural shall be read in the singular, for if taken in the plural, there are none to whom they can be ascribed.

As to the other questions which have been argued, we think that the conveyance of the attorney, under which the defendant derives title, was well enough executed, and that whether it was acknowledged in conformity with the statute or not is a matter of indifference, for the acknowledgment is but a means of proving the execution and authenticating the record, when the instrument shall be thereafter recorded; and the statute which requires it being in the affirmative, and without any negative implication to exclude the common law, the conveyance will be valid, as between the parties thereto and those having notice thereof, even though not acknowledged at all.

The judgment of the district court is therefore affirmed.

Affirmed.

MURPHY *v.* CUNNINGHAM.

PRACTICE — *bill of exceptions, when it should be signed.* A bill of exceptions must be signed during the term at which the judgment or opinion excepted to is given, unless a day in vacation is allowed therefor by order of the court.

PRACTICE — *objection waived by joining in error.* But if a defendant join in error, he thereby waives the objection that the bill of exceptions was filed in vacation without an order of court, and all matters appearing in the transcript, which are esteemed in law to form part of the record, will be considered by the court.

NEW TRIAL — *presumption in favor of finding.* Where an issue of fact is submitted to the judge at *nisi prius*, he performs the functions of both court and jury, and the same presumption must be indulged to sustain his finding as would be made in favor of the verdict of a jury.

NEW TRIAL — *sufficiency of evidence to support verdict.* Where the evidence is conflicting, and the question is upon the credibility of the witnesses, a new trial will not be granted.

COSTS ON APPEAL FROM JUSTICE OF THE PEACE — *power to apportion discretionary.* The power conferred by section 16, chapter 19, Revised Statutes, 156, to apportion costs on appeal from justice of the peace, is to be exercised in the discretion of the district court, and error cannot be assigned upon the ruling of the district court in relation thereto.

1	467
1	474
2	21
3	113
3	375
4	327
4	341
10	272
11	510
1	467
20	174
1	467
23	327
1	467
12a	8

Appeal from District Court, Jefferson County.

THE action was brought before a justice of the peace, and thence appealed to the district court. At the trial in the district court, the plaintiff testified: That in the month of December, 1870, he worked for the defendant five and one-half days in a drift, at taking out coal, and that the same was worth four dollars per day; that, before commencing said work, he agreed with defendant to take out and deliver, at the mouth of said drift, the coal, and was to have two dollars per ton for what he took out and so delivered; that he did not know how much coal he did take out, but took out several loads; that he bought of the defendant two pick-eyes, worth seventy-five cents each, and a piece of steel of about eight pounds weight, and had the use of defendants' mule three days, at one dollar per day, in taking out coal, and had not paid defendant for same or either, and defendant was entitled to credit for same; that he did not know what the steel was worth; that he worked for defendant ten and one-half days at quarrying and removing rock, which work was worth per day three and one-half dollars; that before beginning said rock work, he agreed with defendant to make an excavation in a bank, thirty-three feet in length, three feet in width, and, on an average, about eleven feet high, the same being almost nothing in height where he was to commence digging in the bank, and about twenty feet at the back part of said excavation; that he agreed to make said excavation for the sum of fifty dollars, to commence work thereon immediately; no time agreed for the payment therefor; that he worked at said excavation ten and a half days; that the charge made in his account on file for ten and a half days' work was for work done at said excavation; that he commenced and did said work immediately after making said contract, which was in November, A. D. 1870; that witness considered that he had completed the said excavation according to contract; that he measured the said excavation by stepping off lengthwise, and the width thereof by a scraper, which scraper he measured with his hands; that, while

plaintiff was still engaged at the work on said excavation, the defendant appeared and claimed that it was not yet completed, according to the contract, and desired the plaintiff to do certain things in order to the completion of the same, which the plaintiff refused to do and therefore quit work on said excavation.

Michael Hollorum testified: That he worked upon said excavation for the plaintiff, and helped measure the same by stepping the length thereof, and by measuring the width thereof with a scraper, previously measured with his hands, and the same measured about thirty-three feet in length, and about three feet in width.

The defendant testified: That the plaintiff had agreed to take out what coal he took from drift for two dollars per ton; that the plaintiff took out in all only two tons of coal and no more; that plaintiff had the use of defendant's mule in taking out said coal three days, worth one dollar per day for the use of said mule, the plaintiff, by agreement, was to allow the defendant; that defendant let plaintiff have two pick-eyes, for which, by agreement, the plaintiff was to allow defendant one dollar and fifty cents; that plaintiff got a piece of steel of defendant worth two and a half or three dollars, for which plaintiff was to allow defendant what the said steel was worth; that defendant had never at any time employed the plaintiff to work for him by the day, and the plaintiff had never worked by the day for him at any kind of work; that the work done by plaintiff at quarrying and removing rock, was performed under contract; that the contract was as made by plaintiff and defendant; that the plaintiff was to make for the sum of fifty dollars, to be paid when the work was completed, a certain excavation, thirty-three feet long, two and a half feet wide, and, ont he average, eleven feet high; that the excavation was to be made into a bank, and the way they came to call it eleven feet high, was, that they first measured the bank to ascertain the quantity of dirt and rock to be moved, and the same being about nothing in height when it begun, and about twenty feet high at the back part, they called it

eleven feet high on an average; that the plaintiff did not complete said work according to contract, and that it had afterward cost defendant thirty-seven and one-half dollars in cash for hired help to finish said excavation, as the plaintiff had agreed to make it; that the plaintiff did not do more than one-half the work necessary to complete said excavation, and voluntarily abandoned the same without finishing it.

John Armor testified: That plaintiff told him he was to have $50 for making the excavation; plaintiff also told him that the excavation was to be three feet wide and thirty-three feet long, and that the same would average about eleven feet high; witness saw the excavation after it had been abandoned by plaintiff, and that fully one-half or more of the work necessary to be done to complete the excavation according to contract, as witness learned from plaintiff, was left undone.

The court gave judgment for the plaintiff and against the defendant for $25 damages, and for costs of suit.

The plaintiff had judgment before the justice of the peace for $42 damages, and for costs, and it was assigned for error in this court that the district court erred in rendering judgment against appellant for all of the costs of the suit. It was also assigned for error that the finding of the district court was against the evidence.

Mr. A. H. DE FRANCE, for appellant.

Mr. GEORGE W. PURKINS, for appellee.

WELLS, J. By the record which has been certified to us in this case, it appears that the bill of exceptions taken by the plaintiff in error was not filed until the lapse of nearly sixty days after the adjournment of the term at which the judgment complained of was given, and the record fails to show that time was given to present such bill of exceptions.

According to all the authorities, and, indeed, by the letter of the statute, the bill of exceptions must be signed during the term at which the judgment or opinion excepted to is

given, unless a day in vacation is allowed therefor by order of the court. Rev. Stat., ch. 70, § 21.

And, according to some cases, if the record fails to show such order, and that the bill of exceptions was filed within the time limited, it cannot be considered in the appellate court, even though, as it would seem, the objection is not suggested by counsel. *Moffit* v. *Pollard*, 19 Ind. 178; *Cable* v. *Smoyer*, id. 202; *Pick* v. *Vankirk*, 15 id. 159; *Hance* v. *Miller*, 21 Ill. 637.

We think, however, that the verbal agreement of the parties or of counsel may supply the absence of such order of court, and the defendant in error having joined in error and assented to the submission of the cause upon written argument, we will construe this as implying a stipulation that all matters appearing in the transcript and which are esteemed in law to form a part of the record are properly certified to us.

But accepting the bill of exceptions which is set out in the record as properly before us, we are not able to see that any error was committed in the court below.

The only question in issue between the parties was, whether the plaintiff had fully performed the contract for grading and excavation which constituted the principal item of his account, and upon this question, we must presume, unless the contrary clearly appears, that the court below found correctly.

Where an issue of fact is submitted to the determination of the judge at *nisi prius* he performs the functions of both court and jury; he is the exclusive judge of the credibility of witnesses, and in the court of review the same presumption must be indulged to sustain his finding, as would be made in favor of the verdict of a jury, if the issue had been submitted to a jury.

We must, therefore, presume that his honor, who presided below, regarded the witnesses who were sworn on the part of the defendant below (or some of them) as unworthy of credit; and we, who have not heard the witnesses, and can-

not draw conclusions from their manner and bearing in giving testimony, cannot say that he has erred.

The finding of the court below, therefore, cannot be said to be erroneous; and if there is any error apparent in the amount allowed to plaintiff below for his damages, it is not an error of which his adversary can be heard to complain.

Neither can it be assigned for error that the court below omitted to apportion the costs, for this is a matter purely in the discretion of the court.

Let the judgment of the Jefferson district court be affirmed, with costs.

Affirmed.

---

1 472
4 327
4 341
11 510

MATTHEWS et al. *v.* GLINES et al.

NEW TRIAL — ***sufficiency of evidence to support verdict.*** **Where the evidence is conflicting, and the question is upon the credibility of the witnesses, a new trial will not be granted.**

Error to Probate Court, Arapahoe County.

ASSUMPSIT for work, labor and services rendered.

At the trial, the plaintiff, E. A. Reser, testified that plaintiffs were real estate agents, and that Glines, one of the defendants, applied to him to sell a brick house and lots, on which the same was located, at the price of $7,000; that there was nothing said as to the commission to be charged for making such sale; that the customary charge was five per cent up to $3,000, and three per cent on all sums above $3,000; that he had several conversations with one B about the property, and that he advised B to purchase it, and that B did purchase it.

E. G. Matthews, one of the plaintiffs, testified that he had several conversations with B about the property; that, upon one occasion, B told witness that defendants had reduced the price to $6,500, and that B said that he would take the property at that price. Witness subsequently told defendant Glines that B would take the property at the price

named; that Glines then said he could not have it at that price. Glines came to plaintiffs' office a few minutes afterward and told plaintiffs to make the sale at $6,500. Witness did not remember that he said any thing further to B. Witness testified that the customary rate for selling city property was five per cent on the first $3,000, three per cent over $3,000 up to $8,000, and two per cent on all over $8,000. Dr. J. F. Bancroft testified: That he had several conversations with plaintiffs, and with one Hyatt Hussey, about the property, and that he negotiated the purchase of the property with Hussey. Plaintiffs also proved a conveyance, made by defendants, to George A. Jarvis, for the property in question, which conveyance was so made by direction of Dr. Bancroft.

George Glines, one of the defendants, testified that he never had any conversation with Matthews in regard to the property; that Matthews said to him at one time, that he was a member of the firm of Matthews & Reser, and that he had been trying to sell the property in question to Dr. B.; that witness subsequently called at Matthews & Reser's office, and told them if Dr. B. came there, to tell him the property was not for sale, and that he could not have it. Witness further testified, that Reser once asked him if he had sold the Tom Smith property; he said Dr. B. had been bothering them about it a good deal; he said, What do you ask for it! I told him we asked $7,000; he said, I don't think he will give that; I said, all right, he can't have it for any less. Witness afterward asked Reser who authorized him to sell the property; he said Mr. Hussey; witness said that was all right; any thing Mr. Hussey does is all right; after the property was sold, Reser came into witness' office and said, ain't you going to allow us some commissions on that sale up there? Witness said, what sale? he said, the Tom Smith property. Witness told him, I did not authorize you to sell that property; Reser said Mr. Hussey did; witness said, all right, go to Hussey and collect commissions of him; witness told him that he, witness, did not owe him any thing; witness further testi-

fied that he never employed the plaintiffs to sell the property.

Hyatt Hussey testified as follows: I was the party that sold the property described in the deed; Mr. Reser came to me one day and said he had sold the property, along about the middle of March, and told me the property was sold; I asked him who gave him the property for sale; he told me Mr. Glines; I then asked him the terms of sale; he told me the property was sold for $7,000 to Dr. Bancroft, and that Dr. B. would come to the office and let me know to whom to draw the deed; about an hour afterward, Dr. B. came to the office and positively refused to take the property at $7,000, but offered $6,800, which I declined; we had conversation on the subject two or three times a week, and some three weeks after that the sale was finally made.

The court found for the defendants.

Messrs. BROWN & PUTNAM, for plaintiffs in error.

Mr. M. BENEDICT and Mr. JOHN F. BOSTWICK, for defendants in error.

Per CURIAM. This case must be governed by the principle of *Murphy* v. *Cunningham*, *ante* 467.

The only error complained of is, that the judgment should have been for the plaintiffs and not for the defendants, as by the record appears.

The evidence was conflicting, and whether judgment should have gone for the plaintiffs, or against them, depends upon whether credit was due to the witnesses called for them, or to those who were called for their adversary. The judge who presided below, and before whom the issue was tried without a jury, gave credit to the letter, and it does not lie with us to review his action in this regard.

The judgment is affirmed, with costs.

Affirmed.

CENTRAL CITY WATER COMPANY v. KIMBER et al.

PRACTICE — *what must be expressed in a special case.* Where parties waive process and pleading, and come before the court upon an agreed case, the nature of the relief sought must be expressed in the agreement.

JURISDICTION — *upon a special case or statement of facts.* In such case the court acquires jurisdiction of the parties and of the subject-matter, by force of the agreement, and if nothing is expressed as to the judgment or decree to be rendered upon the facts stated, the court is not empowered to do any thing whatever in the premises.

Appeal from District Court, Gilpin County.

THERE was neither process nor pleading in the court below; the parties filed a paper as follows:

This agreement, made and entered into this 15th day of October, A. D. 1871, by and between the Central City Water Company and E. L. Salisbury, Job V. Kimber, Erasmus Garrott, Lawrence Miley, Robert W. Mead, —— Borham, William Fuller, Henry W. Lake, mill owners on North Clear creek,

Witnesseth: That, whereas, there is a dispute pending between said company and said mill owners, as to the right of said company to take and divert the waters of Peck gulch, and to run the same into Central City for public and private use, to wit: for fire purposes and use in houses and mills; and, whereas, it is desirable that said dispute be speedily, and once for always, settled by legal adjudication without reference to technicalities, etc. Now, therefore, in consideration of the premises, it is hereby agreed:

1. That the said water company is duly incorporated under chapter 18, Revised Statutes of Colorado, and under all the several sections of said chapter relating to ditches and flumes, subject to all liabilities, and entitled to all benefits given by said chapter and said sections.

2. That the said company propose to take water out of Peck gulch, a tributary of North Clear creek, at a point about one hundred rods above its mouth, and convey water to Central by route designated; and that such water is

thus diverted from North Clear creek, and does not reach it again, if at all, till at a point below a majority of the mills on North Clear creek.

3. That the mills owned by said mill owners are all situate on North Clear creek, at distances varying from two to four miles below the mouth of Peck gulch, and have been run and used by the present owners and grantors for periods of from two to ten years, and are both water and steam; and that a certain amount of water is needed for each mill, both for the batteries and for steam purposes, all of which, as well as for water power, when used, has heretofore been taken from said North Clear creek.

4. It is also admitted and agreed, that, in a dry season of the year, the water is insufficient to use as an economic water power without the aid of steam, but is, most of the time, sufficient to supply the batteries and water for steam purposes.

5. It is also agreed and admitted, there is at least one stream running into said Clear creek below the mouth of Peck, and above all, or nearly all, of the mills.

6. It is further agreed, that this case shall be submitted to the district court of Gilpin county, at November session, upon the facts above set forth, and the evidence to be taken and presented as hereinafter mentioned; and that the matter in dispute shall be submitted to said court at all events and without any delay or postponement, and that the decision of said court as to the right of said water company to take the water from said Peck gulch shall be final, except in case either party may wish to appeal, in which case such appeal may be taken to the supreme court, and this agreement and the evidence taken shall, together with the record, be taken as the record in this case, and such appeal shall be heard upon such record at the next session of the supreme court, and neither party shall be allowed to postpone the hearing thereof for any cause whatever.

It is further agreed, that, upon final decision of this cause, either by the district court or by the supreme court, both parties shall submit and make no attempt to deprive

the other of any right adjudged to belong to them or it, or to interfere with the waters of Peck gulch so as to diminish the flow legally going to the other, except upon agreement duly made.

It is further agreed, that no process need be issued herein; that upon filing of this agreement with the clerk of the district court at its next session, all parties hereto shall be in said court, and subject to its jurisdiction, and that the costs in this case shall be paid, one-half by said company, and one-half by the mill owners.

It is also agreed, that each party shall choose a competent engineer, who shall choose a third, who shall make an accurate measurement of the water running in Peck gulch, both at its mouth, and at a point directly above the point from which the company propose to take the water out, and also the amount of increase of water by reason of the bed rock ditch, dug by said company. Also the amount of water running in North Clear creek, immediately above the mouth of Peck gulch, the amount running in said creek, immediately above Missouri gulch, and the amount running in said creek, at a point near the mill known as the Mammoth Company's mill, as well as the amount running in Missouri gulch, and report the same, under oath, to the court, at said November session, and lastly, all other testimony desired by either party may be taken in writing before the clerk of said court, on three days' notice, in writing, upon either Hugh Butler, Esq., or G. B. Reed, Esq., for the mill owners, or upon Willard or H. M. Teller, on part of the company; such testimony to be taken in time, so as to not delay, in any manner, the hearing of said cause, and that no attempt shall be made by said company to take the water of said Peck gulch until a final decision has been had in the district or supreme court, except upon postponement of said hearing and decision by the said mill owners.

In witness whereof the parties have hereunto set their hands.

Edw. L. Salisbury, Job V. Kimber, L. C. Miley, Robert. W. Mead, Kimber, and Fullerton, H. W. Lake.

The court found for the plaintiffs, Kimber et al., and that the said defendant had not the right to take and divert the water of Peck gulch in said county, and to run the same into Central City in said county, for defendant's private purposes, to wit, for fire purposes, and for use in houses and mills.

Judgment was given against the defendant for costs.

Messrs. JOHNSON & TELLER, for appellant.

Mr. G. B. REID, for appellee.

HALLETT, C. J. These parties appeared in the court below, with a statement of facts signed by appellees only, from which it appears that they desired an adjudication of some kind as to the right of appellant to divert the waters of Peck gulch from their natural channel. It does not appear that the waters of Peck gulch have been diverted, but it is stated that appellant proposes to do so, and the only paragraph in the agreed statement which conveys any information as to the nature of the relief sought is that in which it is agreed that the decision of the court as to the right of appellant to divert the waters of Peck gulch shall be final. Usually a special case or statement of facts is made in a cause pending, where the nature of the relief sought is sufficiently indicated by the form of action. But if parties waive process and pleading, and come before the court upon a naked statement of facts, there is nothing in the record to show what relief is desired unless it is expressed in the agreement itself. The court acquires jurisdiction of the parties and of the subject-matter in such case by force of the agreement, and if nothing is expressed as to the judgment or decree, to be rendered upon the facts stated, the court is not empowered to do any thing whatever in the premises. Courts are established to administer the law in cases of specific injury, and to render judgments and decrees is the essential power conferred upon them. All judicial proceedings are instituted and maintained for the purpose of obtaining specific relief, and this does not

appear to have been directed to that end. If parties may go before a court with a naked statement of facts, and demand information as to their rights, without more, our courts will become schools of instruction, with little time to attend to their proper and legitimate duties. The question propounded in this record is interesting and probably important, but we must decline to answer it. When it becomes necessary to determine the rights of these parties, for the purpose of affording relief to either of them, we will cheerfully perform that duty, but we cannot engage in an idle discussion which would be without any definite result or legal character. The court below was authorized by the agreement of the parties to divide the costs of the proceeding between them, and this was not done, but all the costs were adjudged against appellant. As the matter of costs only was within the jurisdiction of the court, we do not think it necessary to remand the cause for the purpose of securing a correct judgment upon that point, and therefore the judgment will be reversed.

Reversed.

GILPIN v. WATTS.

SPECIFIC PERFORMANCE — *title to land.* A vendor who seeks specific performance of a contract for a sale of land must, in his bill of complaint, set forth his readiness and ability to make a good title to the land.

SPECIFIC PERFORMANCE — *decree should extend to the whole contract.* Upon bill by vendor against vendee to enforce specific performance of contract for sale of land, the defendant cannot be required to pay the purchase-money, or, in default thereof, to surrender the contract to be canceled, except upon the condition that the complainant convey the land to him.

POSSESSION OF LAND *obtained under contract of purchase.* Where a vendee of land has obtained possession from the vendor under a contract of purchase, if he refuses to pay the purchase-money, and accept the vendor's title, he must surrender the possession. And this, although the vendor has not a good title.

PRACTICE — *how possession may be recovered.* And the vendor may recover possession of the land in a suit to enforce specific performance of the contract.

PLEADING — *prayer for possession need not be special.* In such case the com plainant may have relief under the general prayer.

Appeal from District Court, Arapahoe County.

THE complainant alleged in his bill, that, on the 17th of February, 1862, he entered into a contract with William Gilpin, defendant, for the sale of certain land granted to the heirs of Luis Maria Baca, by the act of congress entitled "An act to confirm certain private land claims in the territory of New Mexico," approved June 21, 1860 (12 Stat. at Large, 72). That, by the terms of said contract, he sold to the defendant one of the grants or claims of land mentioned in said act of congress, which was estimated to contain one hundred thousand acres of land, for the sum of thirty cents per acre, payable in five equal annual installments, commencing two years after the date of sale; the purchase-money to bear interest at five per cent per annum from the date of sale, payable semi-annually, the first payment of interest to be made with the first installment of purchase-money. That defendant was to locate the tract of land, and complainant was to convey the same to him in fee simple when the same should be located, paid for and surveyed. That, at defendant's request, the float or grant was located on a tract of land then in the territory of New Mexico, but now in the county of Saguache, in the territory of Colorado, which tract was described in the bill, and it was alleged that it amounted to $99{,}289\frac{82}{100}$ acres. Complainant further alleged that he had obtained a conveyance in fee simple from the heirs of Baca to the said tract of land, a copy of which was attached to the bill as an exhibit.

This conveyance, as appeared from the copy attached to the bill, contained the names of about sixty-five grantors, of whom some had executed it, and others had not. A person had subscribed his name to the conveyance as attorney in fact for the heirs of various parties, but the names of such heirs were not subscribed. There were other objections to the conveyance, which it is not necessary to mention. Complainant further alleged that he had tendered to defendant a deed for the land, and that the purchase-money had not, nor had any part thereof, been paid to him, and that such

purchase-money was still due and unpaid. It was further alleged that, at the time of the contract, the defendant entered into possession of the land, and had retained the possession thereof. The defendant demurred to the bill for want of equity, and because the complainant did not show in his bill, title in fee simple to the land. The demurrer was overruled, and the defendant stood by it. Upon the coming in of the master's report, the defendant excepted thereto, which exceptions were overruled, and the court decreed that there was due the complainant on the contract the sum of $42,267.68, and that the defendant pay the same to complainant within sixty days, and in default of such payment, that the defendant be forever barred and foreclosed of all equity of redemption, etc., and that the defendant surrender the said contract to be canceled, etc.

Messrs. MILLER & MARKHAM, and Messrs. CHARLES & ELBERT, for appellant.

Mr. JOHN S. WATTS, *pro se.*

Mr. S. E. BROWNE and Mr. ALFRED SAYRE, of counsel for appellee.

WELLS, J. Three questions, arising upon this record, appear to us entitled to consideration. First. Does the complainant's bill make a case for the interposition of equity to compel specific performance? Second. Assuming the bill to have sufficiently stated a case for specific performance, is the decree which was given below the proper decree upon such case? Third. Was there error in overruling the defendant's demurrer to the complainant's bill?

The resolution of the first of these questions depends upon whether the exhibits attached to the bill, and which are therein prayed to be taken as a part thereof, shall be considered as a part of the bill in such sense that, upon demurrer, the court may look into the exhibits and receive what appears therein to falsify the complainant's express allegations. The complainant contracted to give a perfect

title, and specific performance cannot be decreed at his suit unless he be prepared to furnish such perfect title; and his readiness and ability to do this ought, we think, to be affirmatively set forth in the bill, for so are the precedents; though it is held that, if he show himself able to make a good title at the time of final decree, this will satisfy the averment.

Now, if we are to consider the exhibits as a part of the bill, in the sense in which counsel have assumed that they are, it may well be doubted whether complainant has such a title as he has contracted to convey. But whether the exhibits are a part of the bill in this sense, and so are brought into view upon demurrer, is a question upon which we are not agreed.

But, however the first question may be resolved, we are all of opinion that the second must be answered in the negative, for, assuming that the complainant's bill sufficiently makes out his equity to have the contract which is set up specifically performed, yet the court below has decreed that the defendant below, by a day limited, make payment of the purchase-money, or, in default of such payment, surrender the contract to be canceled; and there is no requirement upon the complainant to make the conveyance which was the consideration of the defendant's promise to pay. That is to say, the defendant is required to perform on his part, and complainant is at liberty to perform, or omit to perform, at his own option.

It is true that the bill contains an offer to produce, subject to the order of the court, the conveyance which, it is averred, complainant had before tendered to the defendant; but there is nothing to show that such conveyance was, in fact, ever brought into court or delivered to any officer of court; and the original cause being determined by the final decree, it appears to us doubtful whether the defendant has any remedy to compel its production. The decree ought to be a final determination of the whole controversy, so far as the case made warrants. The purchaser ought not to be required to pay the purchase-money, and then resort to his

motion or bill of review, or other process, if there be any effectual to this end, to secure a conveyance.

As to the third question: The argument of counsel for the plaintiff in error upon this point rests upon two assumptions, namely: 1. That the conveyance of Baca's heirs, alleged to have been executed to the complainant, is to be taken as a part of the bill or demurrer; and, 2. That unless complainant's bill shows a case for specific performance, which is the relief specially prayed, he can have no relief whatever. To the first of these, as before said, we are not prepared to assent, and the latter we conceive to be opposed to both reason and authority. For though, when it is doubtful to what relief in particular the complainant, upon the state of facts, is entitled, the bill ought technically to be framed with a double aspect, or with a prayer for alternative relief, yet nothing is better settled than that when specific relief in one form only is prayed, and this relief cannot be granted, the court may, nevertheless, when the bill contains the general prayer, grant any relief consistent with the facts stated, unless in the particular case this course would operate to surprise the defendant.

Now in this case the bill alleges and the demurrer admits that the defendant has enjoyed the lands which are the subject of the controversy, his possession being derived from the complainant, since the year 1863; and granting, for the argument sake, that the complainant is not able to make out such a title as the defendant contracted for, nevertheless the defendant, if he will not accept such title as the complainant tenders, ought certainly not to retain this possession. He cannot have both the lands and the money which he has agreed to pay for the lands. *Smith* v. *Lloyd*, 1 Madd. 56; *Clark* v. *Willson*, 15 Vesey, 317; *Tindall* v. *Cobham*, 6 M. & K. 385.

It appears by the English cases, which I have cited, that where there is a controversy as to the title tendered, and the purchaser has already been let into possession, the court will, on mere motion, require him to either bring the purchase-money into court or yield up the possession. I do

not see that it is said that the bill must, on its face, show a case for specific performance in order to entitle the vendor to his motion, nor upon principle ought this to be required; for when the vendor's bill does aver his ability to make title, his right to the provisional alternative relief, by motion, as practiced in the English courts, rests not at all upon this averment, but upon the principle that he ought not to be deprived of the lands, nor kept out of possession thereof without compensation, even though his title be defective. To have afforded such relief would certainly, therefore, have been consistent with the case made by the bill, whether the title there set up be a perfect title, or otherwise. Neither could it have occasioned surprise or prejudice to the defendant, for it would have been the same relief which the bill prays specifically, though in less degree.

We are of opinion, therefore, that no error was committed in overruling the demurrer to complainant's bill.

For the error in the final decree, however, that decree will be reversed, and the cause is now remanded to the district court for further proceedings according to equity.

Reversed.

---

1 484
11 94
1 484
17 123
1 484
12a 78

ANDERSON et al. *v.* SLOAN, Administrator.

PRACTICE — *affidavit denying execution of instrument sued on.* An affidavit accompanying a plea of *non est factum* must follow the plea so far as to deny the execution of the instrument sued on.

Where it is alleged in a declaration on an appeal bond, that defendants executed the bond by the name and style of T. G. Anderson, Edwin Scudder and A. C. Hunt, an affidavit in which it is averred that the defendants did not make their said supposed writing obligatory, signed Thomas G. Anderson, Edwin Scudder and A. C. Hunt, is not sufficient to deny the execution of the instrument.

PLEADING — *nil debet in debt on a specialty.* In an action on an appeal bond the plea of *nil debet* is bad.

SURETY IN APPEAL BOND *cannot require obligee to proceed against his principal.* In an action on an appeal bond, a plea by a surety in the bond that execution has not been sued out on the judgment from which the appeal was taken is bad.

PLEADING *in debt on appeal bond.* In an action on an appeal bond by an administrator of the obligee, a plea interposed by a surety in the bond to the effect that, if the plaintiff, as administrator, etc., has been damnified, it is because of the wrong and default of his intestate, is bad.

WAIVER OF DEMURRER *by going to trial.* If, after filing a demurrer to the declaration, a defendant proceeds to trial on the merits, he thereby waives his demurrer, and cannot object in this court that the issue thereon remains undetermined.

WAIVER OF ISSUE OF FACT *by going to trial.* And in such case the defendant cannot object that there was no issue of fact. If he appear at the trial and proceed as upon issue joined, he must abide the result.

RECORD *of defendants' appearance at trial.* Where the record recites that the defendants appeared at the trial, the presumption is that all were present who had been served with process.

PLEADING *denying execution of instrument must be verified.* If a plea denying the execution of the instrument sued on is put in without oath, the execution of the instrument need not be proved.

JUDGMENT *in action of debt — form.* In an action of debt, a judgment in the form used in actions of assumpsit is erroneous.

PRACTICE — *where error in form of judgment.* But if no error appears prior to the verdict, the cause will be remanded, with leave to plaintiff to move the court below for the proper judgment.

Appeal from District Court, Arapahoe County.

Mr. H. R. HUNT and Mr. ALFRED SAYRE, for appellants.

Messrs. CHARLES & ELBERT, for appellee.

BELFORD, J. This was an action on an appeal bond, instituted in the Arapahoe district court by the appellee against the appellants. The declaration charges that the defendants below, Thomas G. Anderson, Edwin Scudder and A. C. Hunt, under the name and style of T. G. Anderson, Edwin Scudder and A. C. Hunt, executed their certain writing obligatory, sealed with their seals, etc., and conditioned as follows: The condition of this obligation is such, that, whereas, the said John G. Sloan, etc., did, on the 26th day of April, 1868, in the district court, etc., recover a judgment against the above bounden Thomas G. Anderson, for the sum of $1,200, etc., from which said judgment the said Thomas G. Anderson, did, etc., sue out of the supreme court. etc., a writ of error, removing said cause from the district to

the supreme court, and which writ of error was to operate as a supersedeas. Now, if the above bounden Thomas G. Anderson shall duly prosecute his said writ of error, and shall pay said judgment, costs, interest and damages in case said judgment shall be affirmed, then the above obligation to be void, otherwise to remain in full force and effect. It is further averred, that the judgment was duly affirmed by the supreme court, and that Anderson has failed and refused to pay said judgment and costs, or any part thereof, according to the letter and effect of the said writing obligatory, whereby, etc., an action has accrued, etc.

To this declaration, Hunt filed several pleas. 1st. *Non est factum.* 2d. Amounting to *nil debet.* 3d. That he had signed the bond as surety, and that no execution had been issued on the original judgment by Sloan against Anderson. 4th. That if the plaintiff or his intestate has been damnified, it is owing to their own laches, etc.

Anderson filed a general demurrer, and also assigned special causes — which demurrer remained undisposed of at the time of the trial.

As to Scudder, the record shows the following plea: "And the said defendants, Edwin Scudder and Thomas G. Anderson, comes and defends the wrong and injury, when, etc., and says that the said writing obligatory in said declaration mentioned is not his deed, and of this he puts himself on the country, etc., (signed) Edwin Scudder, by Alfred and Daniel Sayre, his attorneys."

The plaintiff filed a demurrer to the second, third and fourth pleas interposed by Hunt, and also a motion to strike out the verification to the plea of *non est factum.* The demurrer and motion were sustained by the court, and this action of the court constitutes one of the errors assigned.

The verification to the plea of *non est factum* was in the following form:

The said defendant, A. C. Hunt, by way of verification to the plea by him above pleaded, being duly sworn, upon oath says: "That he and the said defendants, Thomas G. Anderson and Edwin Scudder, at the time when, etc., in

the said declaration mentioned, or at any other time, did not make their said supposed writing obligatory, signed Thomas G. Anderson, Edwin Scudder and A. C. Hunt. (Signed) A. C. Hunt, sworn and subscribed," etc.

It is evident that this verification is evasive and in no manner responsive to the allegation of the declaration. It was not charged that the writing obligatory sued on was signed Thomas G. Anderson, Edwin Scudder and A. C. Hunt. The person making this affidavit could readily swear to the statements therein contained, and when the oath was so taken, the execution of the bond set out in the declaration would remain undenied. It is equally clear that the affiant did not intend to deny the execution of the bond as charged.

The court committed no error in striking this verification from the files. *King* v. *Haines*, 23 Ill. 341.

As to the plea of *nil debet* it is clearly bad; no principle of law being better settled than that this is an improper plea to an action of debt upon a specialty or deed where it is the foundation of an action. *Sneed* v. *Wister*, 8 Wheat. 694; 6 Blatchford, 162.

The third and fourth pleas are no better. The condition of the bond is, that if the judgment be affirmed, the parties executing the obligation shall pay the judgment, damages and costs. It was not necessary that an execution should be sued out on the judgment before a right of action would accrue on the bond. As between the obligors and obligees, all the obligors are principal debtors, though, as between each other, they may have the rights and remedies resulting from the relation of principal and surety. As long as the obligee does no act varying the terms of the original contract, he has the same claim upon the sureties that he has upon the principal for the payment of the bond.

It is objected in the argument, though not specially assigned as error, that the trial below was wrong, Anderson's demurrer remaining undisposed of. We are aware that in *Gray* v. *Cooper*, 5 Ind. 506, and *Waldo* v. *Richter*, 17 id. 634, it has been held error to proceed to trial of issues of fact before the jury, where issues of law remain undis-

posed of; but we are not at liberty to follow these cases, even if we concurred in the reasons assigned in their support.

In the case of *Evans* v. *Gee*, 11 Pet. 85, this precise point was involved, and the court held that the irregularity was waived by the defendant going to trial upon the merits, and that he could not avail himself of it in the appellate court. Regarding the plea, above alluded to, as the individual plea of Scudder, the record shows that the "defendants" submitted to trial on the merits, and that the defendants made their motion for a new trial, and the judgment was rendered against the "defendants."

In the case of *Kirby* v. *Holmes*, 6 Ind. 33, it is held, that if a judgment be rendered in form against the defendants, it will be presumed to be against all of them.

The record shows that the defendants were all personally served with process, and that they appeared to the action by their attorneys, and when they submitted to a trial on the merits, we cannot do otherwise than presume that it amounted to a waiver of the demurrer on the part of Anderson.

Of course the presumption spoken of by the supreme court of Indiana would not obtain when there was no service of process or personal appearance. It must be understood as applying to cases where the word "defendants" may embrace, and should be understood to embrace, all the defendants who, as the record showed, might and should be embraced in the judgment. *Clagget* v. *Blanchard*, 8 Dana, 43; *Violet* v. *Waters*, 1 J. J. Marsh. 303.

It may be claimed, however, that, although the demurrer was waived, still there was no issue as to Anderson, and hence a mistrial. We cannot allow the defendant, after permitting the cause to proceed as though issue had been joined, to take advantage of that fact in this court.

It is claimed by the appellants that the court erred in allowing the bond to go in evidence; that there was a variance between that offered and the one declared upon. We think not. The bond was set out in the declaration *in hæc verba*. The obligation offered corresponded with that set

out. There was no sworn plea denying the execution of the bond, and it was not necessary to furnish any proof of its execution. *Non est factum* was the general issue at common law in actions on bonds, and its office was to put in issue the execution of the deed sued on. It was not necessary that the plea should be verified. In this territory the term *non est factum* is and has been applied to all pleas, answers and replies that deny the execution of a written instrument constituting the foundation of the previous pleading answered by such denial; but such pleading has not been regarded as having the effect to put in issue the execution of any written instrument, but only its existence, unless the pleading was verified by oath.

We are clearly of the opinion that no error was committed by the court below in allowing the bond to be read in evidence. The other assignments of error are, in our judgment, equally untenable.

The judgment, however, will have to be reversed, it being entered in assumpsit instead of debt. But as a careful examination has failed to show any error previous to the finding of the verdict, and inasmuch as it is sufficient to sustain a judgment, we deem it unnecessary to award a *venire facias de novo*, but we reverse the judgment and remand the cause, with leave to plaintiff to move the court below for a judgment on the verdict. And the court below is directed to enter the proper judgment.

Reversed.

ANDRE *v.* JONES.

1	489
5	123
5	124
1	489
14	489
14	440
1	489
35	423

APPEAL — *how prayed for.* If several defendants pray an appeal jointly, and the appeal bond is executed by one only, and recite an appeal by one, it is irregular, and the appeal will be dismissed.

APPEAL BOND — *when amendable.* In such case the appeal bond is not amendable.

Appeal from District Court, Clear Creek County.

JONES recovered judgment against Andre and Haskins; both defendants appealed, and day was given to perfect the

appeal, by bond, with security. Within the time limited Andre filed his bond, with surety, but his co-defendant did not join therein, and the condition of the bond recited an appeal by Andre only.

Mr. H. M. TELLER, for appellee, moved to dismiss the appeal for the imperfections of the bond.

Mr. W. R. GORSLINE, for appellant, asked leave to amend the bond.

BELFORD, J., was of opinion that leave to amend ought to be allowed.

Per CURIAM. The motion to dismiss must be allowed; the appeal was granted upon certain conditions, which have not been complied with. Haskins has evidently abandoned his appeal. The defendants might have prayed joint and several appeals, but they both united in the only appeal which was prayed, and a joint appeal of two cannot be prosecuted by one only. *Watson* v. *Thrall*, 3 Gilm. 69; *Johnson* v. *Barber*, 4 id. 1.

Motion allowed.

CLEMENTS *v.* HAHN.

PRACTICE IN SUPREME COURT—*certiorari for lost records.* Certiorari will not be issued to bring up matter, not of record, in the court below.

Where a bill of exceptions has been lost from the files of the court below, certiorari cannot be issued to bring up the record of such bill until the loss has been supplied.

Error to District Court, Gilpin County.

PLAINTIFF in error suggested diminution of the record on the affidavit of Charles C. Post, Esq., who appeared for the defendant in the court below, now plaintiff in error, and who deposed to facts tending to show that a bill of the exceptions reserved by the defendant upon the trial in the

court below had been prepared by him and allowed, and signed by the chief justice who presided at that trial, and had been afterward filed in the office of the clerk of the district court. The affidavit further set forth that deponent had diligently searched the office of said clerk and procured the clerk to make search among all the papers in his office and in all places where it might be, and that said bill of exceptions could not be found.

Per CURIAM. Certiorari cannot go upon this showing. The affidavit relied upon shows that the bill of exceptions no longer remains in the court below, and the clerk of that court cannot certify what is not. It may be that, upon proper showing, the district court will, in the exercise of its discretion, allow this bill of exceptions to be supplied by copy. If that should be done, you may then renew your suggestion.

Motion denied.

PAUL *v.* LUTTRELL.

PRACTICE — *proceedings when judgment is reversed and cause is remanded.* When the judgment of a district court is reversed in this court, and the cause is remanded for a new trial, the jurisdiction of the district court is restored, and the parties are bound to attend and proceed to trial whenever required by that court.

In such case it is not essential that the plaintiff should proceed at the first term after the judgment is reversed.

Nor that he should file the precept or mandate of this court before proceeding in the district court.

Nor that he should give notice to his adversary of his intention to docket the cause in the district court.

Upon motion for supersedeas.

LUTTRELL brought replevin against Paul in the Jefferson district court, and upon the writ of replevin the property was taken by the sheriff and delivered to him. At the last term of this court a judgment theretofore given in the

district court was reversed, and the cause was remanded for a new trial.

At the October term, 1871, of the district court, a jury was called, and upon their verdict judgment was given for the plaintiff Luttrell, that he have the property, and damages for the detention thereof were adjudged to him, and a *retorno habendo* was awarded.

Upon this trial, as appeared by the record, no one appeared for the defendant; it further appeared, that no transcript of the order of this court, whereby the cause was remanded, was at any time filed in the district court.

Paul now moved for a supersedeas, assigning for error, among other things:

1. That after reversal in the supreme court of the former judgment, the district court proceeded to a new trial of the issues, and gave judgment thereon, although no precept or mandate had been issued out of the supreme court directing the said district court to proceed further.

2. That, after judgment of reversal in the supreme court of the former judgment given in the district court, the cause was not docketed in the district court until the second term succeeding, and then without notice to the defendant.

3. That, by the judgment of the district court, the defendant was required to return to the plaintiff the goods and chattels which were already in plaintiff's possession.

Per CURIAM. Your motion must be denied. When the former judgment of the district court was reversed, the defendant still remained in court, and was bound to attend and proceed to trial whenever required by the district court. He was not entitled to notice from the plaintiff of his purpose to docket the cause or proceed to trial.

That the plaintiff failed to have the cause docketed, or to file the mandate of this court in the court below at the first term after judgment of reversal, is nothing; the cause was, nevertheless, pending there, and if the defendant desired any step taken at that time he might have procured the mandate himself, or he might have proceeded as the plain-

tiff did, finally, without the mandate. The jurisdiction of the district court over the cause was restored as soon as judgment was given in this court. The mandate was but evidence of that jurisdiction; and, though there are prudential reasons, perhaps, why transcript of the final orders of this court, where causes are remanded, should be filed in the court below before either party is allowed to proceed, yet it is not error to proceed without it, for the question is altogether one of jurisdiction, and if the transcript should be filed at any time hereafter, as it may be, it will afford conclusive evidence that, at the time when the district court gave the judgment now complained of, it had jurisdiction to do so.

The award of the writ of *retorno* appears to us to be irregular, and if the plaintiff in error proceeds with his writ of error he may probably have that order vacated, but, in the mean time, the defendant in error must be at liberty to take execution for his damages.

Motion denied.

SHALLCROSS *v.* KRETSCHMER.

ERROR *assigned as to matters not of record.* Error cannot be assigned upon the ruling of the court, in allowing a promissory note to be read in evidence, unless the note has been preserved in the record.

DAMAGES *allowed where writ has been prosecuted for delay.* It appearing that the writ of error was prosecuted for delay, twenty per cent of the amount of the judgment below was awarded to the defendant in error.

Error to Probate Court, Arapahoe County.

Messrs. BROWNE & PUTNAM, for plaintiff in error.

Mr. JOHN MECHLING, for defendant in error.

Per CURIAM. A brief filed on behalf of plaintiff in error contains the statement that a promissory note was improperly received in evidence in the court below; but the

note is not preserved in the record, and we cannot act upon the statement of counsel, unsupported by the record. The writ of error appears to have been prosecuted for delay, and we, therefore, affirm the judgment of the court below, with costs, and assess twenty per cent of the judgment below against the plaintiff in error as damages.

Reversed.

WATSON v. HAHN.

CONSIDERATION — *equitable right will support express promise.* If the remedy, by second indorsee of a promissory note against first indorser, is in equity alone, this equitable right is sufficient to support an express promise upon which he may recover at law.

PLEADING AND EVIDENCE — *common counts.* In an action by the second indorsee of a promissory note against the first indorser, the plaintiff may recover upon evidence of an express promise under the common counts.

PRESUMPTION *in favor of judgment below.* Where the bill of exceptions does not contain all of the evidence given on the trial in the court below, the court will presume that the finding of the district court is correct.

PRACTICE — *objection to testimony must be specific.* Upon a general objection in the court below, to copies of papers offered in evidence, it cannot be alleged in this court that there was not sufficient evidence of the loss of the original papers to warrant the use of copies; that objection should have been made in the district court.

Error to District Court, Gilpin County.

Mr. L. C. ROCKWELL, for appellant.

Mr. S. B. HAHN, *pro se.*

HALLETT, C. J. Assumpsit by second indorsee against first indorser of a promissory note, and demurrer to special counts in the declaration overruled; plea of general issue to the common counts, and trial to the court and judgment for the plaintiff.

Upon the question raised by the demurrer, the supreme court held, under a Virginia statute in some respects similar to ours, that an indorsee of a promissory note could not sue

a remote indorser at law (*Mandeville* v. *Riddle*, 1 Cranch, 290), and that the remedy was by bill in equity. *Riddle* v. *Mandeville*, 5 Cranch, 322. In Illinois, whence our statute was obtained, the rule is otherwise. *Clifford* v. *Keating*, 3 Scam. 250.

However this may be, defendant in error proved an express promise to pay, and upon this he may recover under the common counts. According to the case in 5 Cranch, defendant in error was entitled to recover in equity if the law is as claimed by plaintiff, and this equitable right will support the express promise upon which an action at law may certainly be maintained. 1 Pars. on Cont. 444. Therefore it is not necessary to inquire whether the demurrer was properly overruled, and we express no opinion on the point. Again, it does not appear that the bill of exceptions contains all of the evidence given on the trial in the court below, and we will presume that the finding of the court is correct. *Ballance* v. *Leonard*, 37 Ill. 43.

Copies of certain papers were received on the trial, to which plaintiff in error objected generally, but this objection cannot be renewed here. If there was not sufficient evidence of the loss of the original papers to warrant the use of copies, that objection should have been made in the court below. As to the depositions, some of the testimony was irrelevant, but we cannot reverse the judgment for that reason. The testimony is abundantly sufficient to support the judgment of the court, and that which is irrelevant and immaterial could not have had any influence in determining the issue.

The judgment of the district court is affirmed, with costs.

Affirmed.

DOANE et al. *v.* GLENN et al.

EVIDENCE OF DECLARATIONS *of parties in charge of property to show possession.*

On the trial of an issue as to ownership of property, between interpleading claimants and plaintiffs in attachment, the declarations of the claimants

and others who were present with the property, made to the officer at the time the writ was levied, are admissible to show who were in possession of the property.

EVIDENCE *as to who was in charge of property admissible.* The officer having testified that the claimants were with the property attached at the time the levy was made, his testimony upon that point was admissible, and a motion to exclude all of his testimony from the jury, was properly overruled.

MISNOMER — *as to middle name.* The law knows but one christian name, and the omission or incorrect insertion of a middle name or initial letter is immaterial.

PRACTICE — *when formal objections to deposition must be made.* Formal objections to a deposition must be made before trial, and the objection that the official character of a notary public, by whom the deposition was taken, is not authenticated, is of this nature.

DEPOSITION — *witness must be sworn in the cause.* A deposition taken in an attachment suit, upon notice that the deposition would be read upon the trial of the cause, and the witness being sworn to testify in that cause, is not admissible upon the trial of an issue between interpleading claimants of the property attached and the plaintiffs in the attachment.

PRESUMPTION OF OWNERSHIP *arising from possession of personal property.* Upon issue joined between interpleading claimants and plaintiffs in attachment, where there is evidence to show that the claimants were in possession of the property at the time the writ was levied, the jury was properly instructed, that, if the property was found in possession of the claimants at the time of the levy, from such possession the law raises a presumption that the claimants were then the owners of such property.

JUDGMENT *on issue found for interpleading claimants.* It is irregular to enter judgment in favor of the interpleading claimants for the possession of the property attached, but where all the property attached is embraced in the claimant's pleading, the irregularity is not sufficient to reverse judgment.

EVIDENCE OF OWNERSHIP *of property attached — sheriff's return.* Where the sheriff returns to a writ of attachment that the defendants are not found in his county, and does not state in whose possession he found the property attached, such return does not make out a *prima facie* case of ownership of the property in the attachment defendants.

Error to District Court, Arapahoe County.

THE sheriff's return to the writ of attachment was as follows: "I have duly executed this writ by levying on seven hundred and fifty-five head of Texas cattle, branded seventy-one. Six horses or two mares and four geldings, one saddle, one bridle, one heavy wagon, one sorrel mare branded $\frac{Z}{O}$, connected on right shoulder, one sorrel mare branded OX on left hip, M S on shoulder, one sorrel horse branded LL on shoulder, one bay horse branded H on

shoulder, one black poney branded HS on shoulder, one black poney branded B on shoulder, as I am therein commanded, and have the said property now in my possession. The within-named Oliver S. Glenn and Rufus E. Talpey are not found in my county."

The claimants described the property in their plea as follows: "Seven hundred and fifty-five head of Texas cattle branded "71," one sorrel mare branded $\frac{Z}{O}$, connected on right shoulder, one sorrel mare branded OX on left hip, one sorrel horse branded LL on shoulder, one bay horse branded H on shoulder, one black poney branded HS on shoulder, one black poney branded B on shoulder, one saddle, one bridle, one heavy wagon."

The judgment of the court was as follows: "It is considered by the court that the property taken by virtue of the writ of attachment in this cause be delivered up to the said Lockhart T. Glenn and George O. Talpey, and that a writ of *retorno habendo* be awarded and issued therefor."

In addition there was judgment for costs.

The evidence is sufficiently stated in the opinion of the court.

The first instruction to the jury is given in the opinion of the court; the second and third instructions were as follows:

If the interpleading claimants purchased the stock which is in controversy with the funds of the defendants, or held the same for the use of the defendants, then such purchase and holding was a fraud upon the creditors of the defendants, and the property in question was subject to the levy of the plaintiff's writ of attachment.

Such fraud as supposed in the last instruction is not to be presumed or inferred without proofs, and it is for the jury to say, upon all of the facts and circumstances in proof, whether the possession of the interpleading claimants was an honest one or merely colorable and fraudulent.

Messrs. CHARLES & ELBERT, for plaintiffs in error.

Messrs. FRANCE & ROGERS, for defendants in error.

BELFORD, J. Plaintiffs in error commenced suit by attachment in the district court of the county of Weld, on the 22d day of September, 1870, against Oliver S. Glenn and Rufus E. Talpey, for the sum of $7,000. A writ of attachment was issued, directed to the sheriff of said county, which was, on the 23d day of September, 1870, levied on the following described property, to wit: seven hundred and fifty-five head of Texas cattle, six horses, one saddle and bridle, and one heavy wagon. At the following December term of the district court defendants in error filed in said suit their plea, claiming that they were the absolute owners of, and entitled to, the immediate possession of the property above set forth. To this plea a replication was filed by the attachment plaintiffs, denying that the property levied on by the writ of attachment, and described in said plea, was the property of said interpleaders, or that they were entitled to the possession of the same. Issue being joined, by stipulation of the parties, the cause was brought to Arapahoe county for trial. The jury returned a verdict for the defendants in error, on which judgment was rendered for return of the property attached. On the trial below, the interpleading claimants, to support the issue on their side, introduced as a witness one Thomas E. Benson, who testified that, as deputy sheriff, he had levied the writ of attachment; "that at the time of the levy he found the property in the possession of George Glenn and Dr. Talpey. These young men were in possession of the cattle. They had some herders with them. One colored person driving a team, and one other man on horseback. Did not know that they, the interpleaders, were in possession more than the other men who were there, except from what they told him. Saw them there with the cattle, so were the other men as much as they." The plaintiffs moved to exclude this testimony, on the ground that Benson's knowledge of the possession was derived from the declarations of the claimants and, therefore, hearsay and inadmissible. This motion was denied by the court, and this constitutes the first assignment of error, which we will notice. The

declarations made by the claimants to Benson do not appear in the record, and hence, we are unable to judge of their character and force.

It is a settled rule, that the best evidence that the nature of the case will admit of must be adduced unless some obstacle lies in the way which legally authorizes a resort to inferior evidence. The highest degree of certainty of which the mind is capable, with respect to the existence of a particular fact, consists in a knowledge of the fact, derived from actual perception of the fact by the senses. It is seldom, however, that a jury can act upon knowledge of this description; it rarely happens that a fact which can be decided by mere inspection is submitted to the consideration of the jury. The second degree of evidence in the scale of certainty consists of information derived from the relation and information of those who have had the means of obtaining actual knowledge of the fact, from actual perception of the same by the senses; and upon knowledge thus derived juries must in general act. The jury must be informed of the facts by those who are eye and ear witnesses of them. The third degree of evidence in the scale of certainty consists of information derived, not immediately from one who has had actual knowledge of the fact by the perception of his senses, but from one who knows it only by its having been asserted by some other person; this is generally hearsay evidence. And, although there is a rule which excludes hearsay evidence, yet there are numerous exceptions to it, which courts are bound to recognize and enforce, and among the exceptions thus recognized is, that when a declaration is in itself a fact, and is part of the *res gesta*, the objection to hearsay evidence ceases.

The distinction between a mere recital, which is not evidence, and a declaration which is to be considered as a fact in the transaction, and therefore evidence, frequently occasions much discussion. The rule is this: if the declaration has a tending to illustrate the question, and any importance can be attached to it as a circumstance, which is part of the transaction itself, and deriving a degree of credit from

its connection with the circumstances, independently of any credit to be attached to the speaker, then it is admissible. The objection of hearsay evidence can never operate to the exclusion of any statement of a fact which the law regards as a proper and safe medium for conveying the truth to a jury; for, in such case the evidence is admissible, because it is in itself and in connection with the circumstances deserving of credit, and it is no more hearsay evidence than the fact itself. Such evidence does not rest upon the credit due to the person who makes the statement, but it is, in general, good, although the person who made it would not, in ordinary cases, be believed upon oath. It is admitted as a part of the transaction, on the presumption that it is calculated to elucidate the facts with which it is connected, and it is evidence, although the party who made it is himself a competent witness. *Ingram* v. *Plasket*, 3 Blackf. 454. In treating of this subject CLIFFORD, J. (*Insurance Co.* v. *Mosley*, 8 Wal. 412), says: "Undoubtedly whenever evidence of an act done by a party is admissible, the declarations he made at the time the act was done are also admissible, if they were of a character to elucidate and unfold the act, because they derive a degree of credit from the act itself and do not rest entirely upon a statement not made under oath. But such declarations cannot properly be received as evidence, unless the principal act which they accompany and to which they relate is itself material to the issue to be submitted to the jury, nor unless the declarations were made at the time the principal act was done," etc. The record shows that, at the time of the levy of the writ of attachment, these claimants were with the cattle. This is a distinct fact in itself and a fact which was ascertained by Benson by actual perception, a fact which he could and did testify to, so that we find something to which the declarations can attach, and from which they derive a legal support. The latter would be clearly inadmissible were they disconnected from the act of levy. If made at any other time they could not be received, and their admissibility is only secured by

reason of their forming a part of the transaction, of the levy, or what occurred at that time.

In *Nilson* v. *Iverson*, 19 Ala. 95, the declaration of a party, while in the possession of a slave, "that she was his negro and that he intended to keep her," was held admissible as part of the *res gestæ* to prove the character of his possession. And in *Nilson* v. *Iverson*, 17 Ala. 216, the court holds that the declarations of a party in possession are admissible as a part of the *res gestæ* to prove the character of his possession, as that he claims the property as his own, or holds it in subordination to the claims of another. 1 Halstead's Ev. 424, 426.

The material issue to be tried in this case was, the possession and ownership of the property at the date of the levy. The return of the sheriff to the writ shows that the attachment defendants, Oliver S. Glenn and Rufus E. Talpey, were not found in his county at the time the property was attached, and on the trial of the interplea the sheriff testifies that the claimants were with the herd. This certainly was evidence of possession. It might be slight, but still it is entitled to some regard, and especially so when nothing appears to show that the elder Glenn or Talpey had ever been in possession of the cattle. It is true that there were two other parties with the interpleaders at that time, a colored man driving a team, and a man on horseback. And it is claimed that this is evidence of a joint possession. It is sufficient argument on this point to say that these parties nowhere appeared as claimants, nor are they known in any way as interested in this suit, or as parties to this record. Benson says he found the property in the possession of George Glenn and Dr. Talpey. There is an evident confusion of names here, and no effort seems to have been made by the attorneys in the court below to explain this. But it appears from the evidence that, in using these names, the witness intended and designed to designate Lockhart T. Glenn and George O. Talpey, for he says: "these young men, the interpleading claimants, were in possession of the property," etc.

The younger Glenn and Talpey were both present in court, and, from a careful reading of the testimony, there can be no doubt that Benson referred to them when he used the words "George Glenn and Dr. Talpey." Independent of any declarations made by these parties, it would have been error for the court to strike out the evidence of Benson, for the reason that his knowledge of the claimants' possession may have been founded quite as much on the fact that they were with the cattle, and driving them as from their declarations. At least, in establishing the fact of possession, the circumstance that these claimants were with the cattle was proper to be given in evidence, and this circumstance is detailed by Benson.

The next error assigned is the refusal of the court to allow plaintiffs to read in evidence the deposition of James W. Hanna. Several objections were made by the defendants, which we will notice in the following order:

1. The commission is to take the deposition of James H. Hanna, and the deposition taken is that of James W. Hanna.

2. That there is no authentication of the character of the notary public.

3. That the deposition is taken in the original cause, and not in the interpleading suit, and does not permit interrogatories to be propounded in behalf of the claimants.

4. That the parties plaintiffs in this suit were different from those named in the commission.

These objections were all made for the first time on the trial.

There is nothing in the first objection. In legal contemplation, the middle letter constitutes no part of one's name. The law knows but one Christian name, and the omission or incorrect insertion of a middle name or initial is immaterial in pleading; so also in a commission to take depositions. *Franklin* v. *Tallmadge*, 3 Johns. 84; *Roosevelt* v. *Gardiner*, 2 Cow. 463; *Milk* v. *Christie*, 1 Hill, 102; *Ginnis* v. *Martin*, 10 Iowa, 347.

The second objection was not well taken. Generally

speaking, a party cannot be allowed to lull his adversary into security by his silence till the trial commences, and then spring an objection on him which, if sustained, may deprive him of the proof of material facts, which he might have established in a more formal and regular mode, had the objection been made and sustained at an earlier period. 1 Gilm. 425. When formal objections are not made prior to the commencement of the trial, they cannot be heard afterward. The party seeking to use the deposition would be justified in believing that these objections had been waived. To hold any other doctrine on this subject would work most serious mischief. In many instances it would operate to prevent a party from availing himself of the attendance of witnesses, by whom the same matters contained in deposition might be proved.

The third objection is of a more serious and substantial character. The notice was served on the defendants in the attachment suit as well as on the claimants, and contained the statement that the deposition was to be used in evidence on the trial of the above entitled cause, now pending, etc., and that they were at liberty to file cross-interrogatories and join in the commission.

Without deciding whether the notice was sufficient to bind the claimants, we find, from an examination of the notary's certificate to the deposition, that Hanna was sworn as a witness in the case of *Doane et al.* v. *Oliver S. Glenn and Rufus E. Talpey.* It does not appear that he was sworn as a witness in the cause of *Glenn and Talpey, interpleaders*, v. *Doane et al.* To have made this deposition available on the trial of the interplea the witness should have been sworn in that suit. The parties were different, and to have admitted the deposition under these circumstances would have been to give the plaintiffs in error the benefit of his testimony, without the sanctity of an oath. We are of the opinion that the court committed no error in excluding the deposition.

The court gave to the jury the following instruction, which is assigned for error:

"The burden of showing that they are the owners of the property in question, and were such owners at the time of the levy of the attachment is upon the interpleading claimants. But, if, at the time of the levy of the writ of attachment in this case, the property was found in the possession of the interpleading claimants, then, from such possession, the law raises a presumption that the interpleading claimants were then the owners of such property, and unless it has been shown to the satisfaction of the jury that such possession of the interpleading claimants (if they were so in possession) was colorable or fraudulent, and a possession for the use of the defendants in this suit, the interpleading claimants may recover."

The plaintiffs in error claim that the law raises no presumption of ownership from the possession of personal property. Matthews, in his work on Presumptive Evidence, page 30, says: "As to personal property of a movable nature, the general rule is, that possession constitutes the criterion of title, and for this reason, that no other means exist by which a knowledge of the fact to whom it belongs can be attained. Hence, a vendor of personal chattels is never expected to show the origin of his right."

Presumptions, or, as they are sometimes called, "intendments of the law," are inferences or positions established for the most part by the common and occasionally by the statute law, and are obligatory alike on judges and juries. They differ from presumptions of fact, or mixed presumptions, in two important respects. In the latter a discretion more or less extensive, as to drawing the inference, is vested in the tribunal, while in the former the law peremptorily requires a certain inference to be made whenever the facts appear, which it assumes as the basis of that inference. In the second place presumptions of law are, in reality, rules of law, and a part of the law itself, and the court may draw the inference whenever the requisite facts are developed in the pleading, while all other presumptions, however obvious, being only inferences of fact, cannot be made without the intervention of the jury. There is a class of presump-

tions which the law, out of regard for public policy, recognizes and enforces. In such cases it gives an artificial effect to the facts which give rise to the presumption, beyond their natural tendency to produce belief. For instance, when one sets fire to a house the presumption is that he intended injury to its owner. If, then, a legal presumption is one that the law peremptorily requires to be drawn from certain ascertained facts, and which is incumbent alike on courts and juries to make, then clearly the possession of personal property does not create such a presumption. It is purely an inference of fact to be dealt with by the jury, and not one of law to be applied by the court, and falls strictly within Mr. Starkie's definition of natural presumptions, or presumptions of mere fact. It depends wholly upon its own natural force and efficacy in generating conviction in the mind, as derived from those connections which are pointed out by experience, and is altogether independent of all artificial legal relations. It is a fact to be weighed by the jury, when they have found it, as a circumstance, tending to establish in their minds the main fact in issue, to wit: whether the possessor is the real owner.

The inaccuracy of calling it a legal presumption finds sanction in the language of many courts and writers upon the subject of evidence. 12 Wis. 594.

It is said that presumptions of this kind may be properly termed legal presumptions, because they have been so frequently drawn under the sanction of legal tribunals that they are to be viewed as presumptions authorized by law. We cannot, therefore, say that in this cause the naming it a legal presumption in the instruction to the jury was error. The jury were told that the burden of proving ownership was upon the claimants, and they were further told, that while the law did raise a presumption of ownership from possession, yet if that possession was colorable, or for the use of the attachment defendants, then they could not recover. Even if the instructions were erroneous we would not feel at liberty to reverse the case on that ground. The plaintiffs in error had every opportunity to make good their

claim, if they had any. Their examination of witnesses was long and ingenious, and yet they failed to bring before the jury any evidence calculated to satisfy them that the elder Glenn and Talpey were the owners of the property. There are many suspicious circumstances connected with the purchase of the cattle and the conduct of the parties, and these were all brought to the attention of the jury, and after weighing them they returned their verdict for the claimants.

Whatever may be our opinion of the merits of the controversy, we cannot usurp the function of the jury and disregard a verdict that has evidence to support it. The issue below was a clear and distinct one. Was the property levied upon the property of the interpleaders? That issue was fully tried and the court left the jury free to pass upon it, and they resolved it against the plaintiffs in error. The court, in the second instruction given to the jury, told them that if the interpleading claimants purchased the stock in controversy with the funds of the defendants, or held the same for the use of the defendants, then such purchase and holding was a fraud upon the creditors of the defendants, and that the property in question was subject to the levy of the plaintiffs' writ of attachment. Under this instruction, the jury had the right,and doubtless did consider fully, not only the evidence of Blackington, but all the circumstances which were brought out on the trial, and which indicated the character of the transactions had by the younger and elder Glenn and Talpey in reference to the cattle.

Objection is also made to the form of the judgment rendered in this cause. We are of the opinion that the judgment in the present form is irregular. It would be better, in entering judgment in cases of this kind, to have it show that the property described in the plea is the property adjudged to be restored, instead of the property levied upon by the writ of attachment. We do not, however, conceive that an irregularity of this kind is in any way prejudicial to the plaintiffs in error.

There is one other point made by the plaintiffs in error which we think it proper to allude to. It is claimed that

the return, made by the officer on the writ of attachment, was *prima facie* evidence that this property belonged to Oliver S. Glenn and Rufus E. Talpey, as against the interpleading claimants, and would have been sufficient to support the issue on behalf of the plaintiffs, without any further evidence, until rebutted. It is quite true that such returns are commonly evidence of more or less force, according to circumstances, and, particularly, with respect to parties against or for whom they are sought to be used. A familiar illustration is, when a person other than the defendant in execution sues or is sued for property levied on under it, in which case the return usually states the property to belong to the judgment debtor, but the real owner is always permitted to contradict such statement. 2 Philips' Ev. 368, 369 (margin).

The sheriff, in making his return, does not state to whom this property belongs, nor in whose possession it was found. It further appears that, at the time of the levy of the writ, Oliver S. Glenn and Rufus E. Talpey were not found in Weld county. It seems to me that it would be doing violence to every principle of law, to hold that such a return furnishes *prima facie* evidence of ownership in the elder Glenn and Talpey against the interpleaders.

In accordance with the view we have taken of this case, the judgment of the court below must be affirmed.

Affirmed.

SOPRIS *v.* WEBSTER.

1 507
7 65

NEW TRIAL — *verdict not supported by evidence.* If, in an action of replevin, no evidence of the value of the property, or of the value of its use, is given, no more than nominal damages can be allowed for the detention thereof.

Appeal from District Court, Arapahoe County.

Mr. L. B. FRANCE, for appellant.

Mr. S. E. BROWNE, for appellee.

WELLS, J. The judgment in this case is clearly erroneous. The jury awarded the plaintiff $50 as his damages for the wrongful detention of the property in controversy, while there is no evidence in the record of its value or of the value of its use during the detention. There was, therefore, no data upon which damages could be assessed, and only nominal damages should have been allowed.

For this error the judgment is reversed, with costs, and the cause remanded to the district court, with directions to that court to award a new trial.

Reversed.

THE PEOPLE v. MYERS.

JURISDICTION OF SUPREME COURT *in criminal cases.* This court can entertain jurisdiction of causes only in the methods prescribed by law, and cannot give judgment in a criminal cause certified into this court from a district court, without writ of error.

PRACTICE — *removal of records into supreme court.* This court will not take cognizance of questions arising in a criminal cause, which are brought into this court from a district court by agreement of parties.

THE prisoner having been found guilty upon an indictment for murder, at the January term, 1872, of the Arapahoe district court, moved for a new trial. Judgment upon this motion was reserved until the next succeeding term of the court, and upon motion of the prisoner's counsel, the district attorney consenting, certain questions arising upon this motion were directed to be argued in the supreme court at this term.

HARRISON & POWERS for the prisoner now moved upon certified copy of the order of the district court, that the question therein reserved be set down for argument at a future day in this term.

Per CURIAM. We cannot hear the counsel as to these questions. There is no warrant for the course which was pursued

here. We can entertain jurisdiction of causes only in the methods prescribed by law. We can give no judgment here which shall bind the prisoner or any one else. Though we should be of opinion that a new trial ought to be granted, the district court may refuse it, and if we should be of the contrary opinion, and the district court should thereupon deny the prisoner's motion, he may, nevertheless, bring his writ of error, and we must hear counsel again.

The practice of the English courts is of no weight upon this question, because the relation which the English courts at *nisi prius* have to the court *in banc* is essentially different from that of our district courts to this court. When the district court shall have given final judgment upon this indictment, the prisoner may, if he will, apply for his writ of error.

Motion denied.

CREIGHTON v. KERR et al.

1 509
12 296

1 509
25 504

APPEARANCE — *effect of withdrawing.* If a defendant enter an appearance in a cause, in which he has not been served with process, and afterward withdraw his appearance, "without prejudice to the plaintiffs," the plaintiffs are in the same position, as if such appearance had not been withdrawn or in any manner qualified.

The appearance, to all intents and purposes, still stood as a waiver of process, and sufficiently supported the judgment *nil dicit* which was afterward given.

APPEARANCE — *effect of in proceeding in rem.* If, in a suit in attachment, in which service of process has not been made, the defendant enter his appearance, the character of the proceeding is changed from an action *in rem* to an action *in personam.*

ATTACHMENT — *if defendant appear, plaintiff not limited to amount specified in affidavit.* If, in such action, the defendant withdraw his appearance, "without prejudice to the plaintiffs," the plaintiffs are not limited to the amount or causes of action specified in the affidavit in attachment, but may take judgment upon the declaration for an amount not exceeding the damages laid therein.

Error to District Court, Arapahoe County.

SUIT commenced by attachment to the June term, 1870; amount specified in the affidavit $5,563.50. Cause of action

in the affidavit, for telegraph poles and labor and material furnished by the plaintiffs to defendant. The declaration contained the common counts for work and labor, for telegraph poles, goods, wares and merchandise, for money paid, laid out and expended, and a count upon an account stated; the damages were laid at $8,000.

At the October term, 1870, the defendant appeared by Charles & Elbert, his attorneys, and submitted to a rule to plead within ten days. Afterward, and before the expiration of the ten days, an order was entered of record in the cause, as follows:

"Now on this day came Messrs. Charles & Elbert, and withdrew their appearance as attorneys for the said defendant, without prejudice to the plaintiffs."

Afterward, and at the same term, the plaintiffs obtained judgment against the defendant for $8,000 and costs.

Messrs. BELDEN & POWERS and Messrs. CHARLES & ELBERT, for plaintiff in error.

Messrs. SAYRE & WRIGHT, for defendant in error.

WELLS, J. It appears to us that the withdrawal of the appearance which was entered on the part of the plaintiff in error in the court below, whether it be regarded as the act of the attorneys merely or as the act of the defendant himself, left the plaintiffs below in precisely the same position as if it had not been withdrawn or in any manner qualified. If we are to give any effect to the words of the record of this proceeding, they impart a stipulation by the defendant, or at least a condition imposed by the court, that the plaintiffs shall not lose any advantage which, by reason of the appearance, they had gained. The appearance, to all intents and purposes, still stood as a waiver of process, and sufficiently supported the judgment *nil dicit*, which was afterward given.

And this, we think, also disposes of the second question which is presented by counsel, for, if we consider the appearance which was interposed on behalf of the defend-

ant, as still so far subsisting as to waive the necessity of process; if the plaintiffs, notwithstanding the withdrawal of the defendant's attorneys, still maintained their advantage in this respect, it follows that there was still an appearance subsisting on behalf of defendant for all purposes where such appearance could afford the plaintiff any advantage.

Therefore, the attachment which, in the first instance, was but a proceeding *in rem*, and which, by the defendant's appearance, had assumed the character of an action *in personam*, still remained of the same character after the appearance was withdrawn, and the plaintiffs were still entitled to have judgment for whatever damages they might establish under their declaration within the limit of the *ad damnum* laid therein, whether the causes of action cor:ted upon were the same as those mentioned in the affidavit or different. The position of the plaintiffs was the same as if the defendant had plead to the action and the issue had been tried by a jury; and, in such cases, it has uniformly, we believe, been held that the plaintiff's recovery is not limited to the amount or causes of action specified in the affidavit.

We see no error in the record. The judgment of the court below is, therefore, affirmed.

Affirmed.

CONSOLIDATED GREGORY COMPANY *v.* RABER.

1 511
3 87
3 161
1 511
11a 490
1 511
31 84

AGENT OF MINING COMPANY — *extent of authority.* An agent of a mining company may employ laborers in the business of the company, but he cannot pledge the faith of the company to persons not so employed.

If an agent of a mining company employ a person to take care of a team which does not belong to the company, used by such agent while attending to the business of the company, and also while attending to the business of other parties for whom the agent is acting, such employment is beyond the scope of the agent's authority and the company is not liable for the wages of the person so employed.

NEW TRIAL — *evidence to support verdict.* In an action against a mining company by an employee, to recover for services rendered, a declaration by an agent of the company that the plaintiff should lose nothing by the company, and another declaration by a director of the company to the same effect, are to be regarded as admissions of the company and are sufficient to support the verdict.

PRACTICE — *objection to testimony must be specific.* Upon a general objection to the declarations of an agent, made in the court below, the party cannot object in this court that the agent had no authority to bind his principal.

PRACTICE — *where judgment has been taken for a greater sum than the ad damnum.* If judgment is obtained for an amount exceeding the damages laid in the declaration, the plaintiff in the judgment may remit the excess and take judgment in this court for the amount claimed in his declaration.

COSTS — *when plaintiff below has taken judgment for too large an amount.* In such case appellant will be allowed costs in this court.

Appeal from District Court, Gilpin County.

AT the trial, M. B. Hays testified: "That he, as agent of defendant, employed the plaintiff in spring, 1867, at $60 per month, and that plaintiff worked for defendant about a year; that the work of plaintiff was to take care of the team of James E. Lyon & Co., and to saw wood for the house and office, and there was due defendant on the 15th of January, 1868, the sum of $490; that he, the witness, was the agent for defendant, and for James E. Lyon & Co.; that the team was used by him in the business of defendant, and also while attending to the business of other companies."

Mrs. N. Buckman testified: That she had a conversation with Richman, agent of defendant, in 1868, in which she said to Richman, "I hope my brother will not lose any thing by the Consolidated Gregory Company," and he said, "He shall not." Witness was then asked about a conversation with Frank Parmelee. The defendant admitted that Parmelee was, at the time of the conversation, a director of the company. Witness then stated that she had a conversation with Parmelee in 1868, about the claim of plaintiff against defendant, and Parmelee said that plaintiff was a good boy, and should lose nothing by defendant.

The defendant objected generally to the evidence of Mrs. Buckman, but did not state the ground of objection. The

verdict was for $628.83, and the damages were laid in the declaration at $490. Appellee filed in this court a remittitur, by which he proposed to remit to the appellant the amount by which the verdict exceeds the *ad damnum* in the declaration.

Messrs. JOHNSON & TELLER, for appellant.

Mr. L. C. ROCKWELL, for appellee.

HALLETT, C. J. The business of the Gregory Company is mining, milling and melting ores. Raber was employed by the agent of the company to take care of a team, the property of Lyon & Co., which the agent says was used for the company. Lyon & Co. made no charge for the use of the team, and before Raber was employed the company had paid for its keep. I cannot perceive that these facts create any obligation on the part of the company to pay for Raber's services. If Lyon & Co. furnished the team without charge, this is no evidence to show a contract with the groom. It is true that the agent of the company states that he employed Raber for the company, but this was evidently beyond his authority. He could employ laborers in the business of the company, but he could not pledge the faith of the company to persons not so employed.

But the declarations of Richman, who was the successor of Hayes in the agency, and of Parmelee, who was a director of the company, must be regarded as an admission by the company of the indebtedness to Raber, and, therefore, a ratification of Hayes' act in employing him. The account was entered in the books of the company, and Richman objected to it when he took charge of the company's affairs. It is not shown that any other demand in favor of Raber stood upon the company's books, and it is fair to presume that both Richman and Parmalee referred to this demand in their answers to Mrs. Buckman's inquiries. Therefore it cannot be said that the verdict is not supported by the evidence, and, although the right of the plaintiff below is not very clear, we do not see that the court erred in refusing a

new trial. A general objection in the court below to the declarations of Richman and Parmelee cannot be made the basis of a specific objection in this court. If Richman and Parmelee had no authority to bind the company, the attention of the court below should have been drawn to the fact, for possibly the plaintiff would have furnished evidence of their authority if it had been questioned. The amount recovered exceeds the amount shown to be due, but appellee has remitted the excess, a practice sanctioned by high authority. *Bank of Kentucky* v. *Ashley*, 2 Pet. 327.

The *remittitur* will be received, reducing the judgment to $490, for which execution may issue from this court, and the appellant will be allowed costs in this court.

Affirmed.

---

1 514
16 211

1 514
e33 229

DOUGHERTY v. THE PEOPLE.

PRACTICE *in cases of criminal abortion. What is for the consideration of the jury.* Upon indictment, under section 42, Criminal Code (Rev. Stat. 202), for administering a noxious or destructive substance or liquid to a woman pregnant with child, with intent to produce miscarriage, whether the substance or liquid is noxious or destructive is a question of fact for the jury.

INDICTMENT *for criminal abortion — description of drug.* In such case it is not necessary to set out in the indictment the kind of drug or liquid administered.

EVIDENCE *as to drug or liquid administered.* And if the drug or liquid administered is described in the indictment, it is not necessary that the proof should correspond with the allegation.

EVIDENCE *as to effect of the potion.* Nor is it necessary that miscarriage should be produced. If the noxious substance or liquid is administered with *intent* to produce miscarriage, the crime is complete.

EVIDENCE *as to power of potion to produce intended result.* Nor is it necessary that the noxious substance or liquid administered should be poisonous, as the term is commonly understood, or that it should be capable of producing miscarriage.

If the substance administered is unwholesome, and may probably occasion injury or derangement of the system to a woman pregnant with child, it is noxious within the meaning of the statute.

PRACTICE — *changing form of instruction.* The refusal to give a proper instruction cannot be assigned for error, when the court gives other

instructions embracing the correct principle embraced in the instruction asked.

EVIDENCE OF CONFESSION—*whether sufficient to establish guilt.* Upon indictment for administering drugs to a woman pregnant with child, with intent to produce miscarriage, confessions of the prisoner to the effect that he gave certain drugs to the woman named in the indictment, and that the effect of such drugs was to make the woman sick, may be sufficient to establish guilt, there being other evidence to prove the fact of pregnancy, and it appearing that about the time of the alleged offense the prisoner inquired of a physician, and of other persons, to ascertain what kind of drug would produce miscarriage.

Error to District Court, Arapahoe County.

Mr. L. C. ROCKWELL and Mr. G. W. MILLER, for plaintiff in error.

Mr. M. A. ROGERS, district attorney, first judicial district, and Mr. CLINTON REED, district attorney, second judicial district, for the people.

BELFORD, J. The indictment in this case contains three counts. The first alleges that the defendant, on the 10th day of September, 1870, at the county of Clear creek, unlawfully, willfully and feloniously, did administer to, and cause to be taken by, one Maria Casey, she, the said Maria, being then and there pregnant with child, a large quantity of a certain noxious and destructive substance called boneset, with intent thereby, then and there, to procure a miscarriage of the said Maria, etc.

The second alleges that the defendant, unlawfully, willfully and feloniously, did cause to be taken by one Maria Casey, she, the said Maria, being then and there pregnant with child, a certain noxious substance called boneset, and other noxious and destructive substances, administered to the said Maria by the said Daniel Dougherty, etc.

The third count differs in no important particular from the first. In the court below the prisoner's attorney moved to quash the indictment, on the ground that boneset was not a destructive or noxious substance within the contemplation of the statute. This motion was overruled, and this

to cause the death of such person, and being thereof duly convicted, shall be punished by confinement in the penitentiary for a term not less than one year and not more than ten; and every person who shall administer or cause to be administered or taken any such poison, substance or liquid, or who shall use or cause to be used any instrument, of whatever kind, with intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years in the penitentiary, and fined in a sum not exceeding one thousand dollars. And if any woman, by reason of such treatment, shall die, the person or persons administering, or causing to be administered, such poison, substance or liquid, or using or causing to be used any instrument aforesaid, shall be deemed guilty of manslaughter," etc. Crim. Code, § 42. From an examination of this section, it will be observed that the first clause applies to cases of poisoning as popularly understood; that is, to cases when a person, desirous of destroying the life of another, willfully and maliciously administers the poison or other destructive substance, against the consent of the person taking the same. For instance, when a servant girl, designing and intending to take life, should place arsenic in coffee; and the words "malicious" and "willful" applies to poisonings of this kind, and not to cases of abortion. The next clause applies purely to cases of the nature of the one undergoing investigation.

The acts sought to be prohibited and the crime sought to be punished, are the using of noxious substances, or instruments with intent to produce miscarriage. It is not necessary that the miscarriage should take place — that is, that the administering of the drugs or the use of the instrument should be followed by the expulsion of the fœtus. That is not necessary to constitute the crime. It is the *administering* the noxious substance or the use of the instrument with intent to produce miscarriage that makes up the crime — and as to the intent, it may be remarked that it is a well-settled rule of law that a sane man, a voluntary agent, act-

ing upon motives, must be presumed to contemplate and intend the necessary, natural and probable consequences of his own acts. If, therefore, one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is, that he intended so to destroy such life. So, if the direct tendency of the willful act is to do another some great bodily harm, and death in fact follows as a natural and probable consequence of the act, it is to be presumed that he intended such consequences, and he must stand legally responsible for them. So when a physician inserts into the womb of a woman pregnant with child, instruments calculated to produce irritation and serious derangement of the female economy, and abortion follows, the intention to produce that result is a necessary conclusion from the act. So where drugs regarded as abortives are administered to a pregnant woman whose general health is good and requires no medicine, and said drugs so administered are calculated to produce serious disturbance in her system, and miscarriage is thereby superinduced, it may be presumed that the drugs so applied were designed and intended to produce that result. The intention may be rightly inferred from the character of the means employed. We have said thus much as preparatory to the consideration of the instructions given by the court below to the jury, and which are assigned for error. Over the prisoner's objection, the court gave the following instructions: "If the jury believe from the evidence that the prisoner administered or caused to be taken by Maria Casey, named in the indictment, any noxious or destructive substance or liquid with intent to procure a miscarriage of said Maria Casey, then the jury should find the said defendant guilty. It must appear, however, in order to such conviction, not only that the prisoner gave such drug, or substance, or liquid, but that it was actually taken into the person of said Maria Casey. It will suffice, however, that prisoner procured and gave the drug or substance to said Maria with the intent named, and that she afterward took and swallowed such drug or substance, or some portion

of it. And it is not necessary in order to be noxious and destructive, within the meaning of the statute, that such drug should be poisonous, as the term is commonly understood, or should be capable of actually producing the miscarriage. It will be sufficient if, upon the consideration of all the testimony, it shall appear to the jury that such drug, so administered (if any), is unwholesome and might probably occasion injury or derangement of the system to a woman pregnant with child."

In determining the correctness of this instruction it must be borne in mind that the act of miscarriage is not necessary to the gist or completeness of the crime. The crime sought to be punished is the administering of a poison, or noxious or destructive substance or liquid, with the *intent* to produce miscarriage. A person indicted under a statute for administering a drug, or doing some other like act, with intent to procure an abortion, may be convicted, not alone, when the proofs show an unsuccessful attempt, but equally when they show an attempt successful; that is, show an abortion actually committed. 2 Bishop's Crim. L., § 10. What then is a poisonous, noxious and destructive substance in the contemplation of this act? A poison is commonly defined to be a substance which, when administered in *small quantity*, is capable of acting deleteriously on the body; and, in popular language, it is confined to substances which destroy life in small doses. It is obvious, says a learned writer, that the above definition is too restricted for the purposes of medical jurisprudence. It would, if admitted, exclude a large class of substances, the poisonous properties of which cannot be disputed, as for example the salts of copper, tin, zinc, lead and antimony, which, generally speaking, act only as poisons when administered in large doses. A person may die either from a large dose given at one, or from a number of small doses given at such intervals that the system cannot recover from the effects of the one, before another is administered. Some substances, such as nitre, have not been known to act as poisons, except when taken in large doses, while arsenic acts as a poison when

taken in small quantities. But, in a medico-legal view, whether a person die from the effects of half an ounce of nitre, or two grains of arsenic, the responsibility of a person who criminally administers the substance is the same. Each substance must be regarded as a poison, differing from the other only in its degree of activity, and, perhaps, in its mode of operation. The result is the same; death is caused by the substance taken, and the quantity required to destroy life or produce any other hurtful result, cannot, therefore, be made a ground for distinguishing a poisonous from a non-poisonous substance. It cannot be doubted that the definition of poison, above given, sprung out of a desire to get rid of the difficulty that would necessarily be encountered in separating a class of poisons from bodies which are generally reputed inert, and which, under certain conditions, are capable of producing the most serious mischiefs.

Medical practitioners would hardly be ready to admit that common salt, an article of constant domestic use, can be so administered as to become as deleterious and destructive to the functions of life as strychnia. An instance of common salt having caused death occurred in 1839. A young lady swallowed a certain quantity for the purpose of destroying worms. It was considered to be a harmless substance according to common notion, but in the course of a few hours some alarming symptoms made their appearance, and medical assistance was sent for. She was found to be in a state of general paralysis, and although the stomach pump and other antidotal means were speedily employed, she died in the course of a few hours. This case is deserving of notice from the evidence which it furnishes of the fallacy of the popular doctrine, that what is taken so freely in small quantities with benefit may be taken with equal impunity in large doses. It is of little moment therefore, in medicine or law, whether one grain of one substance or one ounce of another substance be taken, provided the fatal effects be traceable to the action of the particular substance in the body. This is the point to which a medical jurist must direct his attention. It is therefore necessary

to look to the noxious effects produced by particular substances on the system, and the adequacy of these substances to cause death under symptoms of poisoning, rather than to the mere quantities in which they may be taken. The question of what is a noxious or destructive substance most generally arises on charges of attempted abortion. In the case of White, tried in England in 1857, it was proved that the prisoner had administered to the prosecutrix a large dose of a substance, popularly known nnder the name of hiera-picra. This is a compound of aloes and canella bark. It was admitted to be a proper medicine in small doses, but capable of acting with injurious effects on pregnant females when given in large doses. The prisoner was convicted. In 1842, in England, two men were indicted for causing the death of another by the administration of a destructive substance. On the day laid in the indictment the deceased had drank several pints of beer which it was afterward proved had been drugged with epsom salts. He was seized with violent purging, and died within forty-eight hours. On an examination of the body the lining membrane of the alimentary canal was found inflamed, and there was no doubt that death was owing to the irritant effects of the salt. One of the prisoners was convicted. The quantity of the substance taken in this case could not be ascertained, but there is reason to suppose the dose was large.

Wharton, in his work on Medical Jurisprudence, book 2, section 236, says: "Most authors assert that there are no specific medicinal substances by which abortion can be produced. The only drug which has any claim to be considered as specific in its action upon the uterus is the ergot of rye; savin and oil of tansy are more frequently used than ergot. They have both, unfortunately, a popular reputation as agents for producing abortion. Their action as abortives is solely due to their poisonous properties, since, when given in proper medicinal doses, they are generally aromatic and stimulant. In fact tansy is in common use as an agreeable bitter for promoting appetite. We think, however, that the administration of either of these drugs to pregnant women,

should always be looked upon with suspicion, for we cannot imagine any condition which at this time would require or justify their use." In section 39, he says: "Powerful purgative medicines, such as aloes, julap, croton oil and elaterium given repeatedly, or in doses capable of setting up violent action of the lower bowels, may produce abortion by a secondary action upon the uterus. The same may be said of cantharides and turpentine. All of these drugs are capable of producing a great degree of active congestion and inflammation in the *pelvic viscera*, and, hence, the uterus is not always exempt from their action. It is certain that, in the greater number of cases, when abortives are criminally employed, the life of the mother is more readily sacrificed than that of her offspring."

As the greater number of substances known under the name of medicines may act like poisons, according to the dose or circumstances under which they are administered, and no precise boundary can be laid down, it would seem that the proof of the crime of poisoning should rest upon the *intention* with which the substance is administered and on the effects produced, or on satisfactory evidence that it is capable either of destroying life or causing injury to health. And in deciding this question, we think it would be doing violence to the wisdom of the legislature to hold, that, when they enacted this section, they intended to limit its operation to such substances as in popular conception were regarded as absolutely poisonous. It is clear and unmistakable that the object had in view, in the enactment of the first clause, was the protection of the person from injury; from stealthy and wicked assaults made by the designing criminal on the life of his intended victim, through the administration of drugs hurtful and ruinous to health and life.

And it is equally clear that, in the enactment of the second clause, they intended specially to protect the mother and her unborn child from operations calculated and directed to the destruction of the one and the inevitable injury of the other. And the spirit and letter of the law are violated

and set at defiance, when a miscarriage is sought to be produced, either by the application or administration of drugs, which act directly and specifically on the womb and thereby superinduce uterine contraction, or by the administration of such drugs as, operating on the general system of the mother, tend to the destruction of her energy and strength and the diminution of her vitality and health and make miscarriage possible, provided always such drugs are administered with the intent to produce miscarriage. *People* v. *Carmichael*, 5 Mich. 21. In the attempts made at abortion, the health of the mother is more frequently ruined than the life of the child is destroyed, and believing that the legislature in the enactment of this humane law designed to protect both from injury, we believe with the judge who charged the jury below, that "It will be sufficient if, upon the consideration of all the testimony, it shall appear to the jury that such drug so administered (if any) is unwholesome and might probably occasion injury or derangement of the system to a woman pregnant with child." If any doubt could exist as to the correctness of the foregoing views, still the evidence clearly shows that the substance administered by the prisoner, which was a compound of boneset and some other unknown drugs, was a noxious substance. It made the woman sick and injured her back. Taking the hurtful consequences resulting from the administration of it, together with the intent with which it was given, there can be no question that it fell clearly within the meaning of the words "noxious or destructive."

On the trial, the prisoner's counsel asked the court to give an instruction on the subject of reasonable doubt. This instruction was little else than a transcript of C. J. Shaw's definition of reasonable doubt in the celebrated Webster case. The court declined to give this instruction as drawn by prisoner's counsel, but, in lieu thereof, charged the jury that a reasonable doubt is that state of the mind on which, upon consideration of all the facts proved, the jury cannot say I am satisfied of the prisoner's guilt. A reasonable doubt is not a mere conjectural doubt, but one that arises

out of the evidence, by fair inference, upon consideration of all the testimony.

Had the court refused to give the instruction as prayed for by the defendant, and declined to give the jury one on the same subject, it would have been error. The court itself may give instructions. The refusal to give a proper instruction cannot be assigned for error, when the court gives others embracing the correct principle of law involved in the instruction asked. *Bland* v. *People*, 3 Scam. 365; 12 Ill. 261; 6 Pet. 628.

It is further claimed that the verdict of the jury cannot be sustained, for the reason that no *corpus delicti* is proved. What is the *corpus delicti* in this case? The pregnancy of Maria Casey, and the administration of the drugs by the defendant. It is said, by the counsel for the prisoner, and very justly, too, that confessions made by a prisoner, unsupported by corroborating circumstances, are not, of themselves, sufficient to prove the *corpus delicti*. There should always be something more than a mere naked confession of one accused, to justify a verdict of guilty. The sad examples furnished in judicial annals, should make courts and juries extremely cautious about basing convictions on foundations of this kind alone. We have carefully considered the evidence in this case, and set it out substantially.

The testimony of Harder is as follows: States he had repeated conversations with defendant, in reference to administering drugs to Maria Casey, with the purpose of procuring abortion. The conversation was at my hotel, in the office thereof, in Idaho. The first conversation was had in July, or August, 1870. The defendant applied to me, in July, to know what medicines might be used to procure an abortion. I told him I heard that tansy would do it. He stated to me his object in wanting to know; did not mention Maria Casey's name.

I told him to marry the girl; said he would see her in hell first; he said the girl was pregnant; he said he had had connection with her not only at that time, but in the spring of 1870.

The next conversation I had with defendant was shortly after; he said he was going to Central City to obtain medicine to procure an abortion; he did not mention the name of Maria Casey; told me that in the spring he had had intercourse with Maria Casey; in all the other conversations he did not mention her by name, but said "she;" part of the time of these conversations Maria Casey was living with defendant's mother; the other part at Lewis'; she, Maria, went to Mrs. Dougherty's house in July; we never talked about any other woman being pregnant, or about abortion in connection with any other woman; he told me he had procured medicine and had given it to Maria, and that she had taken it; that it made her sick at the stomach; that it did not have the desired result; this was in August; at this conversation Maria was living at Mr. Lewis'; defendant said he had been over and given her the medicine; in another conversation defendant told me that Maria was going home with Ed. Bowden; that she fell in the water, and he hoped to God it had knocked the young one out of her. My reason for believing that, in his conversations, he was alluding to Maria Casey are as follows: After Maria left my house he told me he was having connection with her, and in his conversations he told me he used to go in at her window, and that he declined to take her to the dances because he was having carnal intercourse with her.

Dr. Holland. Defendant made application to me in reference to procuring abortion; it was the last of August or first of September; he said he had a girl in a fix and he wished to know what to do in order to get rid of it; I told him I could not give him any thing; when I refused he said it was not sure his girl was in the family way, but that she had not had her monthly sickness for two months, and he wanted to know then what it would be best to take to set her in good health; I told him his mother or any other old lady could do as well as I could; know the nature of the drug called boneset; in large doses it is a violent purgative and an emetic; it is peculiar in this respect; it is used by females to make them regular in their monthly periods; it

is peculiar because it both vomits and purges at the same time when taken in large doses, like a person with the cholera morbus; I do not think it has any direct effect on the womb to produce abortion; the profession has no class of medicines that produce abortions, but we receive it as a general law that any thing that disturbs the female economy seriously, while she is pregnant, will produce the death of the child and its expulsion from the womb; this medicine seriously disturbs the female economy; I should be afraid, as a medical man, to administer boneset very largely to a woman with child; any thing that disturbs the economy would be likely to produce abortion, but boneset has no direct tendency specially to that purpose; the administration of boneset, with any other drug, would be likely to increase the tendency of the other drug or substance to produce abortion; boneset is not considered a poison in popular sense, and yet I think an ounce of the leaves would produce abortion; I regard it as I do all other drugs, hurtful and noxious to a certain extent, beneficial in disease, but hurtful in health.

Mrs. Swartz. In August or September, the defendant asked me if I knew of any thing by which an abortion could be procured, and told me that Maria Casey was pregnant, and said he was going to get medicine for her to take; he said he was going to Dr. Holland to ask him; he told me that the medicine he gave contained boneset, and the other ingredients he could not remember; he also told me that Maria said the medicines she took hurt her back. He further said: That Maria could take the medicine, or go to hell; this was after he had given her the medicine, which she said hurt her back. I told him Maria told me her back was lame, and he said, that she said it was from the effects of the medicine; he then said, she could take it, or go to hell. This was in August or September.

Dr. Edmundson. I was subpœned before coroner's inquest to examine body of Maria Casey; this was in the month of October; made post mortem examination with other physicians. The woman had been pregnant previous

to her death; know this from the size and shape of the womb, and the marks of after-birth still in the womb; I should judge she had been pregnant fully four months; I should judge more, rather than less than that time; the womb had been deprived of its fœtus before her death; she must have conceived about four months before her death; can't say positively how long before her death her womb had been deprived of the fetus, but it was not long, because the womb had not contracted any on itself; should judge it was not more than two or three days before her death that the womb was deprived of its contents. The post mortem was twenty-four hours after her death.

Dr. Justice. Know the drug called boneset. Don't think it has any quality to produce abortion; it is not given for that purpose; it is a domestic remedy, rarely, if ever, prescribed by the profession. I suppose it might be given in poisonous doses; it might be given in sufficient doses to produce harm; never heard of its being given to produce abortion; there are medicines given for that purpose, which have a violent effect on the whole system, or medicines which operate directly on the womb, and produce a contraction of the womb; have known an active cathartic to produce that result; boneset is not classed as an active cathartic, in the quantities in which it is usually given; I can't say what its effect would be in extreme quantities.

Dr. Williams. Boneset is given ordinarily as an emetic; sometimes it acts on the bowels. No record of its having the effect to produce a miscarriage; it is a remedy usually applied in domestic practice; given in large doses it acts freely on the bowels; don't know of its having properties that would tend to produce miscarriage.

From an examination of the foregoing evidence it will be seen that, in the spring and during the summer of 1870, the defendant Dougherty was having illicit intercourse with Maria Casey. That, in the month of July, he applied to Harder with a view to obtain information that would enable him to produce an abortion. These conversations were

frequent, and made at times when no criminal charge was pending. The declarations of the defendant were neither superinduced by hope of mercy or fear of punishment. True, he was contemplating the commission of a crime, and was endeavoring to obtain information whereby he could perpetrate it. In his conversation with Mrs. Swartz, he declares his intention to consult Dr. Holland, which he afterward did. It further appears that he went to Central City to procure medicine, and afterward stated to Mrs. Swartz that he had given the same to Maria, and that it contained boneset; that it made her sick, but did not produce the desired result. When Mrs. Swartz communicated to defendant the conversation she had with Maria, wherein she stated that the medicines given by Dougherty to Maria had hurt her back, the prisoner remarks, "Yes; Maria told me her lame back resulted from the taking of the medicines, and that she could take the medicines or go to hell." He told Harder that he had procured the medicines and given the same to Maria, and that it made her sick. Then we have the evidence of Dr. Edmundson, who, with other physicians, made a post mortem examination of the body of Maria Casey, and who swears that Maria must have conceived some four months before her death. This took place in October. We then have the fact of pregnancy established by Dr. Edmundson. We have the fact of the administration of drugs by the confession made by the defendant, and by the evidence of Mrs. Swartz. We are of the opinion that the *corpus delicti* is sufficiently shown by the evidence, and we, therefore, will not disturb the verdict on that account. After the most careful and exhaustive examination of the whole case, we are all of the opinion that the judgment below should be affirmed, and it is accordingly so ordered.

Affirmed.

POWRIE v. KANSAS PACIFIC RAILWAY CO.

AGENT — *authority of engineer of railway company.* An engineer of a railway company, as such, has no authority to pledge the company to pay indebtedness due from a contractor, who is engaged in building the road, to one of his employees.

PRINCIPAL — *not bound where agent exceeds his authority.* P., who was employed by R., a contractor on a railroad, proposed to discontinue work on account of R.'s inability to pay him. There upon G., an engineer of the railway company, stated that if the men, of whom P. was one, would go on and complete the work, the company would see them paid. There being nothing to show that the engineer was authorized to make such promise, an action against the company will not lie thereon.

Error to Probate Court, Arapahoe County.

IT appeared in evidence that the plaintiff, with others, was employed by one Rice, to work on the Kansas Pacific Railway. Some of the men employed by Rice, distrusting his ability to pay, had an interview with Col. Greenwood, an engineer of the company, who told them to go on and complete the work, and the company would pay; that the Kansas Pacific Railway Company would not see any laboring man come short of his pay.

The action was against the railway company upon this promise. The cause was tried to the court without a jury, and judgment for the defendant.

Messrs. BROWNE & PUTNAM, for plaintiff in error.

Mr. ALFRED SAYRE, for defendants in error.

WELLS, J. It is pretty clearly established by the evidence heard in the court below, that Col. Greenwood, the chief engineer of the defendant, did promise, as the plaintiff claimed, that the company should respond for the wages of Rice's employees upon section seventeen of the grade; that this promise was made to one whom the employees had deputed to represent them; that it was intended to be communicated to the men, and was so communicated; and that

the plaintiff, among others, continued their employment and completed the work.

The plaintiff may therefore have his action, provided these three things concur: 1st. It must appear that the promise was upon a consideration sufficient to support it. 2d. The promise not having been reduced to writing, it must appear to have been an original promise, and not a promise to answer upon the default of another merely, for, otherwise, it is void within the statute of frauds. 3d. It must appear that the engineer who made the promise was the agent of the defendant in that behalf.

As to the first of these requisites, the evidence is clearly sufficient. Rice's employees, doubting their employer's solvency, had abandoned the work, and their resuming and completing it was a good and adequate consideration, for it involved both advantage to the company and loss to the men.

As to the second, the testimony is not free of uncertainty; for though, if we consider only the testimony of the witnesses who speak of it, the promise appears to have been, that the company should pay in any event, and not that they should pay upon Rice's default or the like, yet the subsequent conduct of all parties tends, in some degree, to negative the idea that either the company or Rice, or Rice's employees, understood the company to be directly and in the first instance liable to the men; for, down to the completion of the work, so far as we can ascertain by the testimony, Rice remained in immediate charge of the working party; they looked to him for directions, and it was upon his order alone that they received what they did receive from the company. As to the third requisite, there is nothing in the testimony which affords any light whatever as to the nature or extent of the engineer's authority, except the circumstance that Borst, the paymaster, whom it may be presumed was informed of the nature and scope of the duties and powers of his associates in office, paid Rice's employees upon the direction and authority of the engineer's orders merely.

Herefrom might, if the testimony were more complete than it is, arise an inference of more or less weight, that the engineer had in fact the authority which he assumed, else the paymaster must have disregarded his orders. But here it is to be observed that, so far as appears, Borst never was informed of the promises alleged to have been made by Greenwood, but paid the money accruing upon Rice's contract to the employees directly, instead of to Rice, in pursuance of what he understood to have been an arrangement between Rice and the company, to which the men were not party, for the convenience of Rice, and not in discharge of any liability of the company to the employees; and it would seem that the acts of Borst ought not to be received to found an inference of authority in Greenwood to do that which Borst did not know Greenwood had done.

It appears to us, therefore, that there was no evidence whatever of the agency of Greenwood to make the promise relied upon; his official designation does not, we conceive, imply an authority in such matters, and the plaintiff's proofs were therefore defective in a material point.

The judgment of the probate court is affirmed.

Affirmed.

UNION GOLD MINING CO. *v.* ROCKY MOUNTAIN NATIONAL BANK.

1	531
2	252
2	268
2	566
9	74
1	531
13	75
13	76
1	531
16	127
1	531
24	232
1	531
14a	272

CORPORATION — *dissolution in collateral proceeding.* A corporation cannot be dissolved in a collateral proceeding; and in a suit by a national bank to recover money loaned, if the corporation has not been dissolved in a direct proceeding to that end, the defendant cannot question its existence.

CORPORATION — *dissolution of a national bank.* According to section 53 of the act relating to national banks (13 Stat. at Large, 99), a forfeiture of the rights and privileges of a banking association must be determined and adjudged in a suit instituted by the comptroller of the currency in his own name, and an association organized under that act must stand until dissolved in that way.

PLEADING — *must answer all that it professes to meet.* A plea which goes to the whole declaration and contains an answer to but one count, is bad on demurrer.

CONTRACT PROHIBITED BY LAW, *when void.* A contract to do a thing prohibited by statute is not necessarily void, if the statute visit the unlawful act with a penalty. If the thing prohibited is *malum in se*, the contract cannot be enforced, but as to things not immoral or against public policy, it may be sufficient to enforce the statutory penalty only. If it was not the intention of congress to make void a contract made contrary to the provisions of the act it will be enforced, and for the violation of law the penalty which the statute gives may be applied. Whatever consequences are to follow the violation of the act are expressed in the act itself, and one penalty being given, the court is not at liberty to add another.

CONSTRUCTION *of section 29, of National Bank Act.* Section 29, of the act relating to national banks, contains a direction respecting the management of associations organized under the act, and it is not a limitation upon the powers of such associations.

CONTRACT — *prohibited by law — recovery on.* An action may be maintained by a national bank to recover money loaned exceeding in amount one-tenth part of its capital stock, notwithstanding the prohibition of section 29 of the act under which it was organized.

AGENT OF MINING COMPANY — *authority.* A superintendent of a mine, with authority to take ore therefrom, and crush it for the purpose of obtaining gold, cannot upon such authority borrow money in the name of his principal.

CORPORATION —*presumption as to officer's acts.* The president of a corporation cannot put off his official character at will and deny to those who have business with the corporation, access through him. While acting upon the business of the corporation, all his acts, within the scope of his authority as president, must be regarded as official.

EVIDENCE *of agent's authority to bind his principal.* In an action against a mining company for money borrowed by its agent without authority, where evidence is offered of admissions made by the president of the company, such president may be examined as to his authority to bind the company in relation to the matter in suit.

CORPORATION — *power of president.* The president of a corporation has power to convene the board of directors for the purpose of laying before them any matter affecting the business of the corporation.

AGENT — *authority of president of a corporation.* An undertaking of the president of a corporation to bring before the board of directors, at a time specified, a demand against the corporation for money borrowed by an agent of the corporation, is within the scope of his authority as president, and the corporation is bound to consider the demand at the time specified.

AGENT — *ratification of unauthorized act of.* Where an agency exists, and the agent exceeds his authority, the silence of the principal may give rise to a presumption of an intentional ratification of the unauthorized act.

The circumstances must have been fully understood by the principal before any inference can be drawn from his silence, and they must have been such as not only afforded an opportunity to act or speak, but such, also, as

would properly and naturally call for some action or reply from men similarly situated.

In an action against a corporation to recover money borrowed by its agent without authority, it appeared that the company was notified of the indebtedness on the 16th December, 1868; fifteen days later, the president undertook to present the claim to the board of directors at a meeting to be held in February following, and the corporation disavowed the act of its agent in the spring following. *Held*, that upon these facts, the jury would have been warranted in finding a ratification of the agent's acts.

PRACTICE — *ratification of unauthorized act of agent — how determined.* Where the position of the parties remains the same, whether ratification of the unauthorized act of an agent shall be inferred from the delay of the principal to disavow such act, is a question for the jury.

EVIDENCE *of ratification of agent's acts.* In an action against a mining company to recover money borrowed by its agent without authority, the circumstance that the company retained the ore taken from the mine by the use of the money is not material to the question of ratification.

Nor is it competent to show that the money was expended in the mine or that the expenditure was advantageous to the company, unless it is also shown that the company had knowledge of the loan and of the expenditure. These circumstances are in no way connected with the authority of the agent, or the ratification of his acts by the company.

EVIDENCE — *as to witness' bias or prejudice.* A witness cannot be asked whether he is indebted to one of the parties to the suit for the purpose of showing the disposition of his mind toward such party. The question does not tend to elucidate the point.

EVIDENCE — *as to corrupt agreement between witness and party.* Where it is alleged that a witness refused to testify until the party who called him had made an arrangement concerning certain indebtedness, the character and terms of the arrangement must be made known in order that the court may determine whether it would go to his credibility.

Appeal from District Court, Jefferson County.

THE declaration contained a count for money loaned; a count for goods sold and delivered; a count for money had and received by defendant; a count for money paid, laid out and expended; a count for interest, and a count on an account stated.

The defendant pleaded non assumpsit, and also specially that the plaintiff is a body corporate, with a capital of $50,000, and that, under and by virtue of a law of the United States, entitled "An act to provide national currency," etc., it had no power, right or authority to loan

and advance to defendant the sum of money in the declaration mentioned.

In another special plea the defendant alleged that the plaintiff was a body corporate, organized under the act entitled "An act to provide a national currency," etc., reciting the provisions of the act, and averring "that certain persons did, at the time specified, form an association, with a capital stock of $50,000," which was the plaintiff, and that the plaintiff had no power, authority or right to loan and advance to defendant the sum of money in the declaration mentioned.

In another plea the defendant averred that the plaintiff was a body corporate, etc., and had no right, power or authority to loan or advance to defendant a greater sum than $5,000. Another plea was substantially the same, except that it averred that only $30,000 of the plaintiff's capital stock had been paid in. A demurrer to the special pleas was sustained.

The testimony at the trial was voluminous. Plaintiff introduced evidence tending to prove that George K. Sabin was appointed superintendent of the defendant's mine, in the year 1865; that he remained such superintendent until December, 1868; that, during the years 1867 and 1868, Sabin kept a deposit account with plaintiff in defendant's name, and that he drew money from time to time in the name of defendant, and deposited other money to the credit of the account; that the balance against defendant in December, 1868, was $21,217.06; that Sabin worked defendant's mine in the years 1867 and 1868, taking therefrom a large quantity of valuable gold-bearing ore, and crushing a portion thereof for the purpose of obtaining gold; that the gold thus obtained was deposited in plaintiff's bank to the credit of defendant; that the money obtained by Sabin from plaintiff's bank was expended in operating the mine and in crushing the ore. Several letters were introduced by plaintiff, which were written by Becker, the president of defendant, some of which were addressed to Sabin as superintendent. One of the letters was signed by Becker as president.

There was evidence of several interviews between Becker and the officers of the bank, in relation to the indebtedness, in December, 1868. A communication from Becker, to the president of the bank, which was given in evidence, is as follows:

ROCKY MOUNTAIN NATIONAL BANK,
CENTRAL CITY, COLORADO, *Jan.* 1, 1869.

To the President of the Rocky Mountain National Bank:

SIR — In regard to the overdraft of our company on your bank, permit me to say that, although I am the president of the Union Gold Mining Co., and the owner of a majority of all its stock, Mr. Sabin will do me the justice to state that I had no knowledge of any overdraft, until on or about the middle of December last. I hope you will not feel uneasy about the payment. We have an abundance of ore already broken in the mine, to pay all indebtedness of the company. In fact, this is the only indebtedness I have any knowledge of the company owing, and if it is not paid off out of the mine, I propose to call a meeting of our directors, and submit your claim, and make an assessment at our February meeting (in New York city), to pay off your claim, and any other that the company may owe. I will also state to you clearly and plainly, that there shall be no sales, transfers, mortgages, assignments, deeds of trust, or any other incumbrance put on the property of company in Colorado, or elsewhere, by myself, or by the company, until all the liabilities of the said company are fully paid.

Very respectfully,
Your obedient servant,
THEODORE H. BECKER.

On cross-examination of the witness, Sabin, the defendant offered to show by him that hew as indebted to plaintiff in a large sum of money, and that, at a previous term of the district court, he absented himself from the court, and that, when he appeared as a witness, he refused to testify till the indebtedness was arranged in some way,

and such arrangement put into writing and signed by the plaintiff, and that, since the last term of court, the said matter of indebtedness had been arranged according to the terms required by the witness.

Upon the plaintiff's objection, the testimony was excluded.

The defendant introduced testimony tending to prove that Sabin resigned his agency in April, 1866, and that in the fall of that year he made an arrangement with the defendant, by which he was to work the mine upon his own account, and lay up the first-class ore for the company for the use of the mine.

T. H. Becker testified: That, on the 16th of December, 1868, he wrote the company of the indebtedness to the bank, and that was the first knowledge the company had of the indebtedness.

The defendant offered to prove by Mr. Becker, the nature of his authority from the defendant in respect to the indebtedness due the plaintiff. Upon plaintiff's objection this evidence was rejected.

The charge of the court to the jury was as follows:

If the jury believe that George K. Sabin entered into an arrangement or agreement with the defendant, whereby he was to enter into possession and work the mines of the defendant, at his own expense, and not at the expense of the defendant, and pay to the defendant a certain portion of the ore taken from the mines for the use of the mines, and pay himself and all the expenses of working the mines from the balance of the ore taken from the mines, and that, under the arrangement so made with the defendant, the said Sabin entered into and worked the mines of the defendant; then, the relation existing between the said Sabin and the defendant was not that of principal and agent, but that of landlord and tenant, and is governed by the same law as in case of working land for a share of the crops. And the said Sabin became the lessee of the defendant, and the said defendant is in no way liable for any sum of money borrowed by the said Sabin, and cannot be made liable without a special

promise in writing, made and signed by the defendant. That a corporation is bound by the contracts and acts of its agent, so far as the agent acts within the scope of the authority conferred upon him by the corporation, but no further.

If the jury believe, from the evidence, that George K. Sabin made an agreement or arrangement with the defendant, whereby he was to enter into the mines of defendant and work the same on his own account, and was to mine and deliver to the defendant, on the top of the ground, all the first-class or smelting ore, as rental or tribute for the use of the mines of the defendant, and was to receive no salary from the defendant for his services, but was to pay himself and all expenses of working the mine from the proceeds of the balance of the ore mined from said mines, and that the defendant was not to furnish any money for the working of said mines, and that Sabin was to contract no debts chargeable to the defendant, but was to quit work on said mines whenever he could not pay all expenses and pay himself from the lower grades of ore, then the jury must find for the defendant in this case.

If the jury believe, from the evidence, that Becker was president and general manager of the defendant in 1868 and 1869, and that the defendant had, by George K. Sabin, claiming to be the superintendent or agent of defendant, obtained money of the plaintiff, and that Becker, while acting as president of defendant, with full knowledge of the facts, admitted that such money so obtained was due from the defendant to plaintiff, such admission may be taken by the jury in considering whether the defendant is or is not indebted to the plaintiff.

If the jury believe, from the evidence, that the defendant employed George K. Sabin as its superintendent, in April, A. D. 1865, and that instructions were, at that time, sent in a letter to said Sabin by the president of the defendant, and that Sabin, under said appointment, proceeded to work the mine and mill of the defendant in Central City, where the plaintiff is located, and to make contracts for the defendant from the fall of 1865 until the spring or summer of 1866,

and then stopped working until the fall of 1866, and then resumed said work, and continued said work until December, 1868; and that, during the time from the fall of 1866 until December, 1868, George K. Sabin contracted the debt sued for in this case on behalf of the defendant, and used the money received from the plaintiff in working defendant's mine, and for the defendant, and the defendant received the benefits of the work, knowing that the money had been so applied, then the plaintiff is entitled to recover, unless the defendant has shown that the plaintiff had notice of the change of his agency as sworn to by witnesses Becker, Potts, Bennell, Jr., and Brevoort, in this case.

The court is asked to instruct the jury that the plaintiff is not compelled to prove the appointment of Sabin as superintendent or agent of defendant, by resolution of the board of directors, but the jury may take into consideration all the testimony on that subject, including the acts of the witness Sabin in and about the property of the defendant, and the manner in which the business was carried on, and the opportunities the officers of the defendant had to know how the business was conducted.

The court is asked to instruct the jury that, if Sabin, claiming to be the agent of the defendant, purchased goods on credit in the name of the defendant, and afterward defendant, with full knowledge of all the facts, paid said debt, such payment is a ratification of such agency of said Sabin in making such debts.

If the jury believe, from the evidence, that Theodore H. Becker was president of the defendant in years 1867, 1868 and 1869, and that while he was president he had the active charge or management of defendant's affairs, and while acting in that capacity he recognized George K. Sabin as superintendent or agent of the defendant, then the jury may take such recognition into consideration in determining whether Sabin was the agent of defendant, or defendant had allowed him to assume that he was agent. If the jury find for the plaintiff they will allow interest on the balance due at ten per cent per annum, from the first of January, 1869,

up to this time, except on the item included in plaintiff's account as interest.

If the jury believe, from the evidence, that, during the years 1867 and 1868, George K. Sabin was in the actual charge of the defendant's property, and while in charge of the defendant's property he represented to the plaintiff that he was the agent and superintendent of the defendant, and on the strength of that representation he borrowed money of the plaintiff, the mere fact that he stated to Hense, Smith & Davison that he was working said property on his own account, cannot affect the defendant's liability to the plaintiff, unless the plaintiff knew of these statements at the time the money was loaned.

The court instructs the jury that when one has the actual charge and management of the business of a corporation, with the knowledge of the members and directors, this is evidence of his authority, without any vote or other corporate act constituting him agent of the corporation, and the company will be bound by his contracts, made on their behalf, within the apparent scope of the business intrusted to him. Power to act generally in a particular business or a particular course of trade, in a particular business, however limited, would constitute a general agency.

In general, when an agent is authorized to do an act, and transcends his authority, it is the duty of the principal to repudiate it as soon as he is fully informed of what has been done in his name, by the agent, else he is bound by the act as having ratified it by implication.

The court instructs the jury that, if they believe from the evidence that Sabin held himself out as agent of the defendant, and, while so holding himself out, drew money out of the plaintiff's bank and used the same in working and mining the property of the defendant, and the defendant retained and kept the profits arising and growing out of such working and mining, with the knowledge that the money was so borrowed and applied, then the defendant is liable to the plaintiff for such money, unless it is proved

that the plaintiff knew that Sabin had no authority to draw money out of plaintiff's bank.

If the jury find, from the evidence, that George K. Sabin was the agent of the defendant, and the extent of his authority was defined in a private letter of instructions, then no duty existed on the part of the bank to make inquiries as to any private letter of instructions from the principal to the agent, for such instructions may well be presumed to be of a secret and confidential nature, and not intended to be divulged to other persons.

If the jury believe, from the evidence, that Sabin was not the agent of the defendant, but that the defendant allowed him to work its mine and hold himself out as agent for some considerable time, and Sabin, while so holding himself out as agent of defendant, obtained money of the plaintiff in the name of the defendant, and used the money in mining the property of the defendant, and that the ore taken out by Sabin, by the use of such money, was retained and kept by the defendant with the knowledge of the fact that the money was so used, then the defendant is liable.

The court instructs the jury that if they believe, from the evidence, that George K. Sabin was the agent of the defendant, and, while acting as agent, borrowed the sum of money in controversy of the plaintiff, and expended the same in the business of the defendant and in paying its debts; that the money so advanced by the plaintiff, though so applied, creates no debt against the defendant, but that the jury must further find, from the evidence, before they can find for the plaintiff, in addition to the mere fact of the loan from the plaintiff to Sabin, and the application of the money for the benefit of the defendant, that the defendant had authorized the plaintiff to loan the money to Sabin, or Sabin to borrow the money in controversy from the plaintiff, or had afterward ratified and adopted the act. And the court instructs you that, if the money so borrowed from the plaintiff was applied by Sabin to the taking ore out of the defendant's mine, and that said ore, when thus taken

out, was kept by the defendant, the said defendant having knowledge that the money had been so applied, that that would amount to an adoption of Sabin's acts, and knowledge to the president would be knowledge to the corporation.

The jury returned a verdict for the plaintiff for $27,034.96.

A motion for new trial was made and overruled, and judgment was rendered on verdict.

Mr. E. WAKELEY, Mr. G. B. REED and Mr. HUGH BUTLER, for appellant.

Messrs. JOHNSON & TELLER, Messrs. CHARLES & ELBERT and Mr. W. R. GORSLINE, for appellee.

HALLETT, C. J. Appellant is a mining corporation organized in New York, which owns and operates mines in this territory. T. H. Becker, at first a trustee, and more recently president of the corporation, was in the territory during a portion of the time mentioned in this record, but the evidence does not show that any other officer or shareholder was ever in the territory. In 1865, George K. Sabin was appointed superintendent of the company's mine in Gilpin county, and conducted its affairs until October of that year, when work was discontinued. At the trial, appellant contended, and introduced testimony to prove, that Sabin resigned his agency in the spring of 1866, and that, in the fall of that year, he entered into an agreement with the company by which he was to work the mine on his own account and render to the company the first-class ore. Appellee's testimony on this point tended to prove that Sabin's agency continued until December, 1868, and so the jury found the fact to be. In the years 1867–68, Sabin kept a deposit account in the bank in appellant's name, which, by frequent overdrafts, he increased to the large amount for which, with interest, judgment was rendered against appellant.

In four special pleas appellant alleged that the bank was not able to contract an indebtedness exceeding in amount ten per cent of its capital stock, setting forth the amount of

the stock and other facts to show the alleged incapacity, and, in another plea, the organization and capital stock of the bank is set out, apparently with a view to claim a forfeiture of the charter of the bank, pursuant to section fifty-three of the act under which it was organized. 13 Stat. 99. As to the forfeiture of the charter, it is well settled that a corporation cannot be dissolved in a collateral proceeding, and I do not think that appellant can question the existence of the bank in this way. Angell & Ames on Corporations, § 777; *Robinson* v. *London Hospital*, 11 Hare (44 Eng. Ch.) 24. Section fifty-three provides that the violation of the provisions of the act, which shall work a forfeiture of the rights and franchises of the association, shall be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought by the comptroller of the currency, in his own name, before the association can be declared dissolved, and the bank must stand until dissolved in this way.

The special pleas, in which incapacity of the bank to contract the indebtedness is asserted, go to the whole declaration, and at best answer only the count for money loaned, and therefore the demurrer was properly sustained. In another trial the question may possibly arise on the evidence, and for this reason it may be necessary to make some suggestions as to the true meaning and effect of section 29 of the National Bank Law. That section was obviously intended to protect the shareholders and creditors of a bank organized under the act against an unwise use of its funds, and to this end it was necessary that the duties of the officers of the bank should be defined. I do not perceive that it was equally necessary that the power of the corporation, in relation to loans, should be circumscribed, for the mischief would arise out of the conduct of the officers, rather than the power of the bank. In section 8 the powers of the bank are enumerated, that of loaning money among others. If section 29 is to be regarded as limiting this power, the bank would be unable to recover that which rightfully belonged to it, and this section would tend to accomplish

the ruin which it was designed to prevent. In the well-considered case of *Harris* v. *Runnels*, 12 How. 79, it was said that a contract to do a thing prohibited by statute, is not necessarily void if the statute visit the unlawful act with a penalty. If the thing prohibited is *malum in se*, the contract cannot be enforced, but as to things not immoral or against public policy it may be sufficient to enforce the statutory penalty only. Accordingly it was recently decided in Maryland that a provision in the charter of a bank prohibiting any director or other officer under penalty of fine or imprisonment from borrowing money from the bank, does not exempt a director from liability for money loaned to him in violation of the prohibition. *Lester* v. *Howard Bank*, 33 Md. 558.

If it was not the intention of congress to make the contract void, it will be enforced, and for the violation of law the penalty which the statute gives may be applied. That penalty attends every violation of the act, and is found in section 53. Another and additional penalty is attached to some of the acts prohibited by the statute, as for instance in section 30, it is provided that taking illegal interest shall work a forfeiture of the entire interest, and failure to comply with the provisions of sections 31 and 32 may result in the appointment of a receiver to wind up the business of the bank. This may show that, whatever consequences were to follow the violation of the act are expressed in the act itself, and where one penalty is given I do not think we are at liberty to attach another. We are not to give to section 29 a construction which will defeat the purpose for which it was enacted, and such will be the effect if we deny the right of the bank to recover money which it has paid out. I am persuaded that this section is to be regarded as a direction respecting the management of the bank, and not as a limitation of its powers, and that the rule *pari delicto* is not applicable to this case.

It will not be necessary to consider whether Sabin was agent of the company at the time of the transactions with the bank. The evidence was conflicting, and for the pur-

poses of this discussion I accept the finding of the jury on that point. As to the nature and extent of his agency, it has not been contended that his dealings with the bank were within the scope of his authority. It would be difficult to maintain that a superintendent of a mine, with authority to take ore therefrom and crush it, for the purpose of obtaining gold, can, upon such authority, borrow money in the name of his principal, even if the money be used in carrying on the mine. Undoubtedly, the transactions with the bank were beyond Sabin's authority as agent, and we are now to consider whether there is evidence to show a ratification of his acts by the company.

It does not appear that the company was informed of the indebtedness to the bank prior to December 16, 1868, at which time Becker, the president, communicated such information by mail. There is some testimony to the effect that Becker had earlier information of the indebtedness, but he denies it, and as we cannot know how a jury may determine the fact, we must assume that his statement is correct. At this time the officers of the bank were pressing Becker for payment of the indebtedness, and, although he denied Sabin's authority to contract the indebtedness, he did not repudiate the demand, but expressed a willingness to pay it. On the 1st of January following, he executed to the president of the bank a paper, in which he speaks of the indebtedness as "the over-draft of our company on your bank," and says, "I hope you will not feel uneasy about the payment; we have an abundance of ore already broken in the mine to pay all indebtedness of the company. In fact, this is the only indebtedness I have any knowledge of the company's owing, and if it is not paid off out of the mine, I propose to call a meeting of our directors and submit your claim, and make an assessment at our February meeting (in New York city) to pay off your claim and any others that the company may owe."

Becker states that he wrote this letter under an impression that the company had made some different arrangement with Sabin, and that he refused to sign it as president,

not wishing to bind the company — but this will not affect the character of the letter. The president of a corporation is presumed to know something of its affairs, and the evidence in this case shows that Becker was better acquainted with the business of the company than any other of its officers. He does not state the nature of the arrangement which he supposed the company had made with Sabin, or from what source he derived his impression that such arrangement existed. He had been in communication with his company in regard to Sabin's dealings with the bank, and was at that time its only representative in the territory. If he was acting upon false information he ought to have stated by whom and how he was misled. Nor can the president of a corporation put off his official character at will and deny to those who have business with the corporation, access through him. If an officer of a corporation may, at pleasure, assume the status personal and deny his relations with his principal, it will be impossible to deal with a corporation except at the will of the officers. He was acting upon the business of the company, and all his acts within the scope of his authority as president must be regarded as official. In the evidence it is shown that the president exercised a very general authority in the management of the affairs of the company. When Sabin was appointed superintendent in April, 1865, Creswell, then president, gave him instructions as to the manner of working the mine, and in the fall of that year the work was discontinued by order of the president. Sabin's reports of affairs at the mine were always made to the president, and in December, 1868, Becker, then president, stopped the work and took charge of the mine, and proceeded to adjust the unsettled accounts of the company. Becker states that he used his own funds in paying the debts incurred by Sabin for labor and supplies, but it may be fairly inferred that he was acting for the company in taking possession of the mine. If we regard the payment of the bills as the exuberance of a generous heart, there are other acts of his presidency and of his predecessors in office, done appar-

ently with the knowledge and approval of the directors of the company, which go far to establish the general authority of the president to manage and control the affairs of the company. But this evidence of the authority of the president was not directly to the point, that he was authorized to settle and adjust the debts of the company, and appellant was not allowed to interrogate Becker as to his authority in this matter.

Under our statute Becker was competent to testify, and his authority to bind the company was in issue before the jury, and therefore the evidence should have been received. If, however, Becker had no authority to pledge the company to the payment of any indebtedness, he certainly had authority to convene the board of directors and lay before them the claim of the bank, and this he agreed to do. In the usual course of business a corporation is addressed through its president, and it is an important duty of the executive officer to bring to the knowledge of the board of directors any matter affecting the interest of the corporation.

In *Fulton Bank* v. *New York and Sharon Canal Co.*, 4 Paige, 137, the court said: "It is well settled that notice to an agent of a party whose duty it is, as such agent, to act upon the notice or to communicate the information to his principal in the proper discharge of his trust as such agent is legal notice to the principal; and this rule applies to the agents of corporations as well as others." So, also, in *National Bank* v. *Norton*, 1 Hill, 578, it was said that notice given to the directors of a bank, for the purpose of being communicated to the board of directors, would be sufficient to charge the corporation with knowledge of the fact stated in the notice. This is upon the rule that the principal shall be responsible for the acts and omissions of his agent within the line of the agent's duty. Upon this rule it appears to me that Becker's undertaking to bring the claim of the bank before the board of directors of his company at the February meeting, bound the company to consider the claim at that time. The undertaking was an

exercise of the executive function, and we are at liberty to presume that it was performed. Upon the evidence it seems that notice of the indebtedness was given to the company December 16, 1868. Fifteen days later Becker undertook to present the claim to the board of directors at the February meeting in New York. If the matter was acted on by the company, it does not appear that any notice of the result was given to the bank. Becker states that he told appellee's attorney, in the spring of 1869, that the company refused to pay, but the exact time is not fixed. Upon these facts the jury would have been warranted in finding that the company had ratified Sabin's dealings with the bank, for, where an agency exists, and the agent exceeds his authority, the silence of the principal may give rise to a presumption of an intentional ratification of the unauthorized act. Story's Agency, 256, *et seq.* The circumstances must have been fully understood by the party before any inference can be drawn from his silence, and they must have been such as not only afforded an opportunity to act or speak, but such also as would properly and naturally call for some action or reply from men similarly situated. 1 Greenl. Ev., § 197.

The matter of Sabin's dealings with the bank appears to have been fully explained to Becker, and by his statement the company was equally well informed. The circumstances called for an answer from the company. Money had been obtained by its agent and upon its credit, and the bank was demanding payment. The president of the company acknowledged the justice of the demand, and if the company had any objection to it, it was reasonable to believe that such objection would be made known. Where the delay on the part of the principal to disavow the agency will result in loss, and where the transaction may turn out a profit or loss according to circumstances, the principal must disavow the act of the agent within a reasonable time after notice. *Culver* v. *Ashley*, 1 Am. L. C. 719, note; *Hortons* v. *Townes*, 6 Leigh. 47.

In *Corser* v. *Paul*, 41 N. H. 24, it is said: "There is a

class of admissions which may be either express, or implied from silence or acquiescence. Such are admissions which have been acted upon, or those which have been made to influence the conduct of others or to derive some advantage to the party, and which, therefore, cannot be denied without a breach of good faith."

Upon this it would seem that if the appellant, with knowledge that Sabin was obtaining money from the bank, had stood by and allowed him to go on without objection, it would have been estopped to deny his authority. There is, however, nothing of this kind in the evidence, nor does it appear that the position of the parties would have been different if the company had promptly disavowed the acts of its agent. The question is as to the intention of the company respecting Sabin's dealings with the bank, to be determined upon evidence of its conduct and the declarations of its authorized agents, within the scope of their authority. If at any time the company assented to the acts of its agent, it is as much bound by those acts as it would have been if the agent had been clothed with authority to perform them. The negotiations with Becker, the notice to the company of the indebtedness, the agreement to consider the matter at the February meeting of the board of directors, and the delay of the company to disavow Sabin's acts are facts to be considered by the jury, whose province it is to determine the question of ratification. *Hortons* v. *Townes*, 6 Leigh. 47; *Corser* v. *Paul*, 41 N. H. 24.

Further discussion of the principal points in the case is unnecessary, and it remains to consider some questions which may arise upon another trial.

The circumstance that the company retained the ore taken from the mine is not material to the question of ratification. It is not like the purchase of a chattel by an agent without authority, which, if retained by the principal, affords evidence of his intention to ratify the purchase. In such case the principal acquires, by the act of the agent, property which he had not otherwise; and if he disaffirms the contract he ought to restore the property to its rightful owner.

But here the ore belonged to the company, both before and after it was taken from the mine, and the bank never had any right to it whatever. If any inference is to be drawn from the fact that the ore was retained by the company, it arises out of an obligation to deliver it to some other party, and I do not perceive that any such obligation existed. Nor is it material that the money was expended in the mine, or that the expenditure was advantageous to the company, unless it is shown that the company had knowledge of the loan and of the expenditure. Whether the money was expended in the mine, and whether it resulted in gain or loss to the company, are matters in no way connected with the authority of the agent or the ratification of his acts by the company. If Sabin had authority to obtain money from the bank on behalf of the company, the liability of the latter is not affected by the use to which he appropriated it. A ratification has a retrospective effect, and takes effect as a prior command according to the maxim *omnis ratihabitio retrotrahitur, et mandato priori acquiparatur.* Therefore, if the act of the agent is ratified by the principal, the use of the money is equally foreign to the issue.

A witness may be interrogated as to his relations with the parties to the suit for the purpose of affecting his credibility. Obviously the testimony which it is proposed to draw out must have a tendency to prove the state and disposition of the mind of the witness toward one of the parties to the suit, and I do not see that proof of indebtedness to one of the parties has any such tendency. Upon our experience of human nature we cannot say that, as a rule, debtors are friendly or hostile to their creditors. Doubtless, in many cases, the circumstances of the debtor may lead him to seek the favor of his creditor, but it is impossible to lay down any general rule upon the subject. A matter of this kind may be safely left to the discretion of the judge sitting at the trial. Appellant also proposed to show that Sabin refused to testify until the bank had made an arrangement with him respecting his indebtedness to the latter, but we are not told what the arrangement was. If Sabin asked

favorable terms of payment, or that all or a portion of the indebtedness should be remitted to him, as a condition upon which alone he would testify, evidence of the fact would go to his credibility. A witness who demands compensation other than that which is given by law, for his testimony, is certainly to be regarded with suspicion. The offer, as made, however, did not disclose a corrupt bargain, or any circumstance which could influence Sabin's testimony, and hence it was rightly rejected.

Various questions are presented in the record, which it is deemed unnecessary to discuss. The issues were not presented to the jury upon the views here expressed, and therefore the judgment must be reversed, and the cause remanded with a *venire facias*.

Reversed.

---

1 [illegible]
3 243
6 478
1 550
13 606

WISE et al. v. BROCKER.

WRIT OF ERROR — *new suit.* A proceeding by writ of error to reverse a decree of a district court is a new suit.

PRACTICE *in suit against representative of deceased party to decree.* Error may be brought against the executrix and sole devisee of a deceased party to a decree, without preliminary proof of the death of such party or of the appointment of the person sued.

ABATEMENT — *what is matter for.* If the person sued is not executrix and devisee, as charged, she may plead the fact in abatement.

Error to District Court, Arapahoe County.

WILLIAM A. WISE and Anna Wise sued out a writ of error to the district court of Arapahoe county, to bring up the record of a decree in a cause wherein Franz A. Brocker was complainant, and the said William and Anna were respondents. Amelia L. Brocker was summoned as executrix of the last will and testament, and sole devisee of the estate of Franz A. Brocker.

Messrs. BROWN & PUTNAM, for the said Amelia, now moved to dismiss the writ, for the reason that it did not

appear that the said Franz A. Brocker was dead, and that the said Amelia had any interest in the record aforesaid or in the property therein described.

Mr. M. BENEDICT, *contra.*

Per CURIAM. Franz A. Brocker obtained a decree foreclosing a mortgage given by plaintiffs in error, and defendant in error is summoned as executrix of his will and sole devisee of his estate. As plaintiffs in error were parties to the decree, and directly affected by it, of course they may prosecute this writ; but it is said that Franz A. Brocker is dead, and we have no evidence that defendant in error is executrix as charged. If it were necessary to furnish evidence of the death of the person against whose estate relief is sought, and of the appointment of an executor or administrator of the estate, before suing the representative, there would be some force in the objection. This is a new suit and defendant in error is charged as executrix of an estate. If she is not the representative of the estate she may plead the fact in abatement, but we cannot assume the fact upon motion to dismiss. If there is no further appearance by defendant, probably we shall require evidence of the death of Franz A. Brocker, and of the appointment of defendant as executrix, in order that we may know that the proper party has been summoned, but we cannot dismiss the writ upon motion.

Motion denied.

YUNKER *v.* NICHOLS.

EASEMENT — *right to convey water over land for irrigation.* In this territory lands are held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands.

May exist without grant or prescription. A right to convey water over the land of another for the purpose of irrigating one's land may be acquired under the statute (Rev. Stat. 363), and such right needs not a grant from the owner of the servient estate to support it.

1	551
4	104
4	109
8	413
10	445
1	551
12	531
1	551
18	150
1	551
22	246
1	551
9a	134
9a	135
9a	137
1	551
15a	193
1	551
36	151

Error to District Court, Arapahoe County.

YUNKER brought an action of trespass on the case against Nichols, for diverting water from an irrigating ditch leading from Bear Creek to the plaintiff's farm. It appeared that the ditch was constructed in the spring of the year 1871, by the plaintiff, the defendant and one John Bell, under an agreement that they would share equally in the water conveyed thereby, such water to be used in irrigating the lands of the several parties respectively. After the ditch had been constructed to and across the defendant's land, so as to communicate and supply water to plaintiff's land, the defendant diverted the water from the ditch and caused the same to flow upon his own land, so that none passed down to the plaintiff, whose lands were below those of the defendant, by means whereof the plaintiff's growing crop was greatly injured and diminished in value. It did not appear that there was any memorandum in writing of the agreement in respect to the ditch betwen the plaintiff, the defendant and Bell. The court instructed the jury that, if the plaintiff's right to have water flow over the lands of the defendant was conferred by verbal agreement of the plaintiff, the defendant and a third person, which agreement was never reduced to writing, that the plaintiff could not recover. The jury found for the defendant.

Mr. H. R. HUNT, for plaintiff in error.

Messrs. BROWNE & PUTNAM, for defendant in error.

Separate opinions were filed by the members of the court.

HALLETT, C. J. In England, and in this country, it is considered that the right of one person to conduct water over the land of another is an interest in real estate, which must be conveyed by deed in compliance with the terms of the statute of frauds. In countries where the humidity of the climate is sufficient to supply moisture to plants, there can be no reason for distinguishing this from other ease-

ments in the soil, and therefore the law of England, and of most of our States on this point will be found in the general rules relating to real property.

The principles of the law are undoubtedly of universal application, but some latitude of construction must be allowed to meet the various conditions of life in different countries. The principles of the decalogue may be applied to the conduct of men in every country and clime, but rules respecting the tenure of property must yield to the physical laws of nature, whenever such laws exert a controlling influence.

In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law. The value and usefulness of agricultural lands, in this territory, depend upon the supply of water for irrigation, and this can only be obtained by constructing artificial channels through which it may flow over adjacent lands. These artificial channels are often of great length, and rarely within the lands of a single proprietor. A riparian owner must usually get his supply of water from some point on the stream above his own land, and he is compelled to enter upon the lands of others in order to obtain it. Irrigating ditches cannot be made available at or near the head or point of divergence from the stream, and, while a riparian owner may be able to construct a ditch upon his own territory which shall overflow a portion of his land, he can never make it serviceable to the entire tract. Of course, lands situated at a distance from a stream cannot be irrigated without passing over intermediate lands, and thus all tilled lands, wherever situated, are subject to the same necessity. In other lands, where the rain falls upon the just and the unjust, this necessity is unknown, and is not recognized by the law. But here the law has made provision for this necessity, by withholding from the land-owner the absolute dominion of his estate, which would enable him to deny the right of others to enter upon it for the purpose of ob-

taining needed supplies of water. It was enacted by the first legislative assembly, that persons owning claims on the bank, margin or neighborhood of any stream, should have the right of way over adjacent lands for purposes of irrigation (Laws 1861, p. 67), and this law is still of force. (Rev. Stat. 363.) So, also, the common law recognizes an easement in certain cases, and will imply a grant of such easement where it is especially necessary to the enjoyment of the dominant estate. Phear on Rights of Water, 71.

If one having a close, surrounded with his own land, grants the close to another in fee for life or years, the grantee shall have a way to the close over the grantor's land as incident to the grant, for, without it, he cannot derive any benefit from the grant. So it is, also, where he grants the land and reserves the close to himself. 1 Wm. Saund. 323, note 6; *Pennington* v. *Galland*, 9 Ex. 9; *Snyder* v. *Warford*, 11 Mo. 513.

And if one erect a house and build a conduit thereto in another part of his land, and convey water by pipes to the house, and, afterward, sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is *necessary* and *quasi* appendant thereto. Phear on Rights of Water, 72; *Pheysey* v. *Vicary*, 16 M. & W. 484; *Ryer* v. *Carter*, 1 H. & N. 916. In these cases, it is true, the dominant and servient estates were derived from a common source, but in this they are analogous to the case at bar. All the lands in this territory which are now held by individuals were derived from the general government, and it is fair to presume that the government intended to convey to the citizens the necessary means to make them fruitful.

"Into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself. They are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong. They are

always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force." *West River Bridge Co.* v. *Dix*, 6 How. 532.

When the lands of this territory were derived from the general government, they were subject to the law of nature, which holds them barren until awakened to fertility by nourishing streams of water, and the purchasers could have no benefit from the grant without the right to irrigate them. It may be said, that all lands are held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands, and this servitude arises, not by grant, but by operation of law.

In this case there was evidence tending to prove that defendant consented to the construction of the ditch, which, with the aid of the law, was sufficient to maintain the action. If defendant had refused his consent, the statute prescribed the method of proceeding to perfect plaintiff's right. But, in any event, it was not necessary that defendant should convey to plaintiff the right of way for the ditch, and therefore the charge to the jury was erroneous.

I think that the judgment should be reversed, and that a new trial should be awarded.

BELFORD, J. Yunker sued Nichols in the court below, in an action on the case to recover damages for cutting a certain ditch which had theretofore been constructed on Nichols' land, and for diverting the water therefrom. The declaration contains three counts. It is averred that Yunker, at the commencement of this action, and for a long time anterior thereto, was the owner of a certain tract of land lying from one to two miles distant from a certain stream known as Bear Creek. It is further averred that plaintiff had no facilities on said land for irrigating purposes. It is further alleged that the defendant and one John Bell, John McBroom and Peter Olsen, respectively, claimed cer-

tain tracts of land lying between the land of the plaintiff and the stream above mentioned. That, on the first day of March, 1871, the plaintiff and the said defendant and Bell, not having water facilities on their lands for the purpose of irrigation, built and constructed a dam in said stream of water, adjacent to the land of McBroom, and procured from McBroom and Olsen the right of way across their land, and dug and constructed a certain ditch, and conducted water therein from the dam to the respective lands of Bell and Nichols and the said plaintiff, for the purpose of using the same in irrigating and making said lands available for agricultural purposes. That, by mutual agreement, the water running through the ditch was to be used share and share alike by the parties, each of the parties having the right to divert from said ditch on to their respective tracts one-third of the water. It is further alleged that, notwithstanding this agreement, and after the ditch was constructed and the water let in, the defendant wrongfully and unjustly intending to injure the plaintiff and deprive him of the use of the water not only diverted a larger quantity of it than he was entitled to, but prevented any portion of it from reaching plaintiff's land and prevented the plaintiff from using the ditch, wherefore great damage had accrued, etc. The defendant filed the general denial. The cause was submitted to the jury for trial, who returned a verdict for the defendant. There was no evidence introduced on the part of the defendant, and that of the plaintiff fully sustained the allegations of the declaration. The court gave the jury the following instructions, which are assigned for error:

"If the jury believe, from the evidence, that the right to have water flow over the lands of the defendant and to the lands of the plaintiff, for the interruption of which this action is brought, was conferred by a verbal agreement of the parties or the verbal agreement of the plaintiff and defendant and a third person, which agreement was never reduced to writing, and that the plaintiff had no other right to such flow of water than such verbal agreement; then,

although they should believe from the evidence that the plaintiff actually constructed said ditch, and expended labor and money on the faith of such agreement, and that the defendants actually diverted the water, as charged in the declaration, they must find defendant not guilty."

"The jury cannot find for the plaintiff unless they believe from the evidence that the right which plaintiff claims to have water flow over the land of defendant, and for the obstruction of which right this action is brought, was given by deed of the defendant to plaintiff. If plaintiff's only title to the flow and use of the water was a verbal agreement or consent of the defendant, the plaintiff has no case."

The principle involved in this case has certainly received a large degree of attention, both in this country and in England, and it is to be deeply regretted that those courts which appear to have given it the greatest consideration have failed to preserve any rule of uniformity in their decisions. A broad distinction seems to be taken between a license which is executory, and one that has been executed, and, in many instances, the principle of estoppel has been made available in avoiding the recognized force of the statute of frauds. In some of the States a license to dig a ditch and flow water therein over the land of another is held not to be such an interest in the realty as requires the right to be evidenced by deed; in others, a contrary rule is expressly announced, and licenses of this character are held to be always revocable at the will of the licensor. I apprehend that much of the confusion which obtains on this subject arises from a failure to keep steadily in view the distinction which unquestionably exists between a mere license and a grant. In speaking of this subject, VAUGHAN, C. J., says: "A dispensation or license properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful which, without it, had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license

to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to acts of hunting and cutting down the tree, but as to carrying away of the deer killed and the tree cut down, they are *grants*."

In courts where this distinction has been taken, it has been held that the right to overflow the land of another is an easement, an incoporeal hereditament, and it is an interest in real estate. Title to such easement must be conveyed by grant and established by proof of an actual grant, or by proof of a prescription, from which a grant will be inferred. And if the mode of proof adopted be the showing of an actual grant, the grant must, at least, under the statute of frauds, be in writing, by deed; and the same doctrine has been specially applied to a ditch constructed through the land of another. *Morse* v. *Copeland*, 2 Gray, 305; *Selden* v. *Delaware and Hudson Canal Co.*, 29 N. Y. 635; *Foster* v. *Browning*, 4 R. I. 47; *Foster* v. *N. H. and N. Co.*, 23 Conn. 228. Our attention, however, has been particularly called to the decisions which have been made on this subject in Maine, New Hampshire, Ohio, Iowa and Indiana, and I have endeavored to give them a most careful and critical examination. *Ricker* v. *Kelly*, 1 Greenl. 117, was an action of trespass for cutting down and destroying part of a wooden bridge, the property of the plaintiffs. The defendant, in justifying, pleaded that the bridge was erected on the land of Kelly without his license and against his will, and that he removed it, as he lawfully might do.

The plaintiffs replied that, on a certain day, in consideration of their promise to perform certain work, which was accordingly performed for Kelly, he gave them a license and authority to erect a bridge on his land, and to have a right of way over the same to the bridge; that, by virtue of said license, they erected the bridge, etc. To this replication the defendants demurred, because the plaintiffs had not set out any legal conveyance of title to them to build their

bridge, nor to enter upon or pass over the land for any other purpose, and because it did not appear that said license was in writing, nor how long it was to continue in force. *Held* by the court, that the replication was good and the action maintainable. MELLEN, C. J., after referring to the allegation of the defendant, that the claim of the plaintiffs was an interest in the close within the meaning of the statute of frauds, and the proof of *this interest* not being in writing, the permission of the defendant to the plaintiffs to enter upon the close and build said bridge and enjoy a right of way over the close to the said bridge, is void and ineffectual, says: "In the present case the plaintiffs placed their own materials in the form of part of a bridge on the defendant's land, by their express consent, and if a right of way over the close to the bridge did not pass by parol, *still the defendant had no right* to seize and carry away the plaintiff's property and destroy its value. As well might the owner of a ship-yard permit another to build a ship in it, and when the ship was on the stocks, cut it in pieces and carry it away with impunity," and this really appears to be the controlling principle in that decision. True, the judge holds that the permission having been acted upon, the case was thereby taken out of the operation of the statute of frauds. But if we concede that this decision is made to rest on this latter ground, then the case can no longer be regarded as authority in that State, for the reason that *Pitman* v. *Poor*, 38 Me. 237, silently overrules it, and holds that no permanent interest in real estate can be acquired by a parol agreement, and that the parol license that the plaintiff or his grantor may build a dam on the land of another, to raise a reservoir of water for the use of his mill, will confer no right upon the plaintiff to maintain such dam after it is built, or control the water raised by means of it. This is the last utterance on the subject by that court, so far as I am informed, and must be taken as the established doctrine of that State.

The first case in New Hampshire is that of *Woodbury* v. *Parshley*, 7 N. H. 237. That was an action on the case

The declaration alleged that the plaintiff was seized of a meadow adjoining a certain pond, and that the defendant, by means of a dam erected by him upon his own land, caused the water to overflow and injure the meadow of the plaintiff. The defendant introduced evidence showing that the dam had been erected by the mutual agreement of the parties. The plaintiff objected to the admission of parol evidence to prove such agreement, but the evidence was admitted. The court, after holding that the evidence was rightly admitted, says: "The dam was erected by the defendant at his own expense, with the assent of the plaintiff, for the benefit of both. And here the first question is, whether, under the circumstances, the license was revocable at the will of the plaintiff? The defendant had incurred expenses in erecting the dam. The license had been executed and acted upon. Certainly the plaintiff could not revoke it without tendering to the defendant the expenses that had been incurred in the project."

In *Ameriscoggin Bridge* v. *Bragg*, 11 N. H. 108, the court say: "It is contended further, that the license to erect a bridge on defendant's land cannot be shown by parol testimony, on the ground that it is a permanent easement in the land, with a right at all times to enter and enjoy it, and that such an easement is within the statute of frauds, and can be sustained only by evidence in writing. The distinction between a privilege or easement carrying an interest in land and requiring a writing within the statute of frauds to support it, and a license which may be by parol is said, by Chancellor KENT, to be quite subtle, and that it is difficult in some of the cases to discern a substantial difference between them. A license to an individual to do an act beneficial to him, but requiring an expenditure upon another's land, is held not to be revocable after it has once been acted upon. Such a license is a direct encouragement to expend money, and it would be against conscience to revoke it as soon as the expenditure begins to be beneficial." In *Sampson* v. *Burnside*, 13 N. H. 264, it is held that a parol license to enter on land and lay down aqueduct logs for the pur-

pose of carrying water from a spring to adjoining land, with license to enter from time to time to examine and repair the same, is not a sale of land or an interest in land within the statute of frauds. Whether the license in such a case is revocable or not, is regarded as an open question. In the case of *Houston* v. *Laffer*, 46 N. H. 507, which very strongly resembles the case at bar, the earlier decisions on this subject in that State are all noticed, and, if not directly overruled, their authority is greatly impaired. After alluding to these cases the court say: "But we think the more recent decisions, however, sustain the doctrine that the license is, in all cases, revocable, so far as it remains unexecuted, *or so far as any future enjoyment* of the easement is concerned. To hold otherwise would be giving to a parol license the force of a conveyance of a permanent easement in real estate; such a doctrine cannot be sustained. No such right or interest in real estate can be created by parol." It is evident, therefore, from the later cases, both in Maine and New Hampshire, that a clear departure has been taken from the doctrines announced in the earlier reports, and a tendency has set in to conform to the line of decision pursued in a majority of the States. In Ohio the court has steadily adhered to the doctrine that a parol license, when executed, is irrevocable, and that an action of trespass is maintainable against the licensor for any unjust interference with the rights of the licensee. *Wilson* v. *Chalfant*, 15 Ohio, .

In Iowa, *Wickersham* v. *Orr*, 9 Iowa, 260, the irrevocability of an executed parol license is made to rest on the ground that when money or labor has been expended on the land of another, upon the faith of a promise given by him, the owner shall not assert his legal right to the soil so as to interfere with that use or enjoyment of the thing which has resulted from such promise by the money and labor of the licensee.

In *Bently* v. *Gregory*, 17 Iowa, , it is held that a parol license which has been acted upon, and which has led to the expenditure of money and labor, cannot be revoked until compensation for such expenditure has been made. Taking

this last case as modifying the principle announced in the former, we have the courts of two States, Ohio and Pennsylvania, adhering strictly to the doctrine of the irrevocability of an executed license, while in all the other States, as well as in England (*Wood* v. *Leadbetter*, 13 M. & W.), licenses of this character are held to be revocable at will, as being in contravention of the statute of frauds. Viewing the instructions given by the judge below, to the jury, as the announcement of doctrines which should govern a court of law in the administration of purely legal principles, I am not prepared to dissent from them, but, while I yield to them that measure of homage so fully accorded by others, I cannot shut my eyes to the fact that it is doing violence to every principle of justice, to allow a statute designedly passed to cut off and prevent frauds, to be converted into an instrument whereby they may be practiced and fostered. That which was originally intended as a shield and defense for rights should never be permitted to become a means of assault for their overthrow. Courts of equity which constantly adapt themselves to the progress of society and civilization, and whose principles accumulate with the experience of ages, have certainly blunted the sharper edges of the statute of frauds, and evolved a doctrine in every respect more consonant with the interest of society, namely, that he who by his admissions or, conduct induces another to act, cannot afterward be permitted to assert the contrary to the injury or prejudice of the party who has already acted upon the faith and in the belief created by him; and all the courts concur in holding that an estoppel *in pais* exists, when a party makes a statement to another, which that other relies and acts upon, and which it would be a fraud in the party making the statement to afterward controvert, so far as the statement affects the other's pecuniary rights. It cannot be denied that the common law has, in a great measure, accommodated itself to this doctrine of estoppel, especially so far as it affects personal property, and its application in matters of that nature is constant; nor is it wanting in examples in relation to real estate. So great a jurist as Lord MANSFIELD

would not suffer a man to recover even in ejectment, when he had stood by and seen the defendant build on his land. And, in the case of *Hearn* v. *Rogers*, 9 B. & C. 577, Mr. Justice BAILEY said, that under the same circumstances he would apply the same doctrine. Mr. Justice BULLER, in the case of *Farr* v. *Newman*, 4 D. & E. 636, remarks: "That when a rule of property is settled in a court of equity, and there are no decisions against it at law, I am as ready as any man to follow the line of equity, for I think it absurd and injurious to the community, that different rules should prevail in different courts on the same subject." And to the same effect is the language of Lord ELDEN in *Smith* v. *Doe*, 7 Price, 509. In the case of *Shaw* v. *Bebee*, 35 Vt. 208, the principle of estoppel was applied. That was an action of ejectment. The court say, "We are aware that there have been decisions questioning the extension of this doctrine of estoppel *in pais* to affect the title to lands. But a review of the decisions shows that the great weight of authority is consonant with the views we have here expressed. All concur that such facts constitute an estoppel as to personal property, and upon reason and principle to prevent fraud and promote justice the same rule should be extended to real property." It is also true, that the common-law courts of Pennsylvania have adopted it; and they have adopted many other principles which had first received their sanction in courts of equity. *Wents* v. *De Haven*, 1 Serg. & Rawle, 312. The same principle was applied in *Corbet* v. *Norcron*, 35 N. H. 115, and in *Heard* v. *Hall*, 16 Pick. 457, and in *White* v. *Perkins*, 24 id. 324.

In the State of Nevada they have yielded to the force of the same doctrine, as will be seen from the case of *Sharan* v. *Mennick*, 6 Nev. 389; so also in California. *Kelly* v. *Taylor*, 23 Cal. 11; 5 id. 84, and 8 id. 44.

In *Snowdon* v. *Wilds*, 19 Ind. 14, the court say: "But though a parol license amounting, in terms, to an easement, is revocable as to future enjoyment at law, and is determined by a conveyance of the estate upon which it was enjoyed, this is not the rule in all cases, in courts of equity. In these

courts the future enjoyment of an executed parol license, granted upon a consideration, or upon the faith of which money has been expended, will be enforced, at all events when adequate compensation in damages could not be obtained. This will be done upon the two grounds of estoppel and fraud, and the specific performance of a partly executed contract to prevent fraud. And in those States where law and equity are administered in the same court, relief is afforded in any given suit when the pleadings present the necessary averments." When courts of law so freely apply this principle, in regard to personalty, it is difficult to comprehend why any hesitation should exist in its application to real estate. What would be justice in one case would be equally so in the other; and in equity it is accordingly admitted, and why should it not be so at common law. It may be said, however, that the distinction between law and equity is maintained in this territory. That is true only in a qualified sense. The same officer administers both, and at the same term of court, and to me it seems strange and preposterous for the same judge to turn the party out of his court one day to enable him to avail himself of a well-known, well-defined and well-settled rule in jurisprudence, as applicable in a rational point of view to proceedings in one tribunal as in those of another, especially when, as in this territory, the very court which is to decide in equity is the same tribunal. It cannot be controverted that, under the facts set forth in the declaration, Yunker would be entitled, in a court of equity, to a remedy, that would secure him in the enjoyment of the ditch and the water flowing therein. Would a court of equity also compensate him for the damages which he has sustained by reason of the unjust interference of Nichols? then it would be invading the domain of the law, and setting itself up as the admeasurer of damages; a comfortable and assuring spectacle indeed, when the same judge had, the day before, declined, for reasons of grave public policy, to invade the domain of equity. If the court should, however, feel unable to award compensatory damages, Yunker would be remediless, for the affirmance of the

judgment below would bar his right of action, although the deed which the court of equity would require Nichols to make might be adjudged to take effect from the date of the construction of the ditch.

In the notes to Smith's Leading Cases, vol. 2, p. 762 (6th Am. ed.), the learned annotators say: "It would, therefore, seem too late to contend that the title to real estate cannot be barred by matter *in pais* without disregarding the statute of frauds, and the only room for dispute is as to the forum in which relief must be sought. The remedy in such cases lay originally in chancery, and no redress could be had in the courts of common law unless under rare and exceptional cases. But the common law has been enlarged and enriched with the principles and maxims of equity, which are constantly applied at the present day in this country and in England for the relief of sureties, the protection of mortgagors and the benefit of purchasers by a wise adaption of ancient forms to the more liberal spirit of modern times. The doctrine of equitable estoppel is derived from the courts of equity, and as those courts apply to every species of property, there would seem no reason why its application should be restricted in courts of law. Protection against fraud is equally necessary, whatever be the nature of the interest at stake, and it would seem that, whether the controversy be in equity or at law, there is nothing in the nature of real estate which should deprive it of the benefit of those wise and salutary principles which are now applied without scruple, in both jurisdictions, in case of personalty. And whatever may be the wisdom of the change which has broken the barriers by which the doctrine of equitable estoppel was formerly excluded from legal tribunals, it has now gone too far to be confined within any limits less than the whole field of jurisprudence." *Buckholler* v. *Edwards*, 16 Ga. 593.

It seems to me, after the doctrine has received the sanction of such courts as those of Maine, New Hampshire, Pennsylvania, Georgia, Ohio, Indiana, Iowa, Nevada and California, we can run no serious risk in applying its bene-

fits to the property within our borders. If the foregoing views are in any measure open to objection, still another reason exists which imperatively demands the reversal of the judgment below. At an early period in our territorial history, the legislature, keenly alive to the wants and necessities of our people, enacted a law on the subject of irrigation, the provisions of which were designed to secure to all persons who claim, own or hold a possessory right or title to land within the boundary of Colorado, when those claims are on the bank, margin or neighborhood of any stream of water, the use of the water of said stream for the purposes of irrigation and making said claims available, to the full extent of the soil, for agricultural purposes. And further providing that, when the land so held or owned is removed from said stream of water, the owner or claimant shall be entitled to a right of way through the farms or tracts of land, which lie above and below him on said stream, for the purposes above stated. The constitutionality of this law is, however, assailed, and it becomes necessary to pass upon it. To avoid acknowledging the fact that constitutions sometimes surrender to the force of necessity, the general opinion obtains that courts and legislatures are justified in presuming that, within the scope and spirit of wise, august instruments, every power may be found, the exercise of which is essential to the public welfare.

If the warrant for performing an act, justly esteemed indispensable to the public prosperity, is not found in an express grant, then the authority finds lodgment in the implied powers of the constitution; for whenever the end is required the means are authorized, and whenever a general power to do a thing is given, every particular power necessary for doing it is included. It would be almost impracticable, if it were not useless, to enumerate the various instances in which congress, in the progress of the government, has made use of incidental and implied means to execute its powers. They are almost infinitely varied in their ramification and details. 2 Story on Const., § 1258. One of the most important interests of this territory is the

agricultural interest. This can only be fostered and nourished by a system of irrigation, and the right to legislate on this subject seems to me clear and unquestionable. If, then, the agriculture is essential to the well-being of this territory, and can only be developed by a system of irrigation, it seems to me a matter of absolute necessity, that the legislature should have power to pass needful laws whereby the great body of land lying within our boundaries should be made available — and that necessity confers a right to pass such laws, I will endeavor to demonstrate. No such power as that of selling lands for the non-payment of taxes is to be found in the revealed, natural, civil or common law. But there are analogous powers to be found in the common-law code and in the statute law of every civilized nation; for example, the power to condemn land for public uses, and the other cases where power is exercised over the estates of citizens, such as the sale of lands for the payment of the debts of owner. The taxing power has no existence in a state of nature. It is the creature of civil society, government begets its necessity. There must be interwoven in the frame of every government a general power of taxation. Money is with propriety considered as the vital principle of the body politic, as that which sustains its life and motion and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must necessarily ensue: either the people must be subjected to continual plunder or the government must perish for want of revenue to support it. It may, therefore, be laid down as a principle of universal constitutional law, that the power to levy taxes is an incident to sovereignty, without which no government could exercise the powers expressly delegated to it. Blackwell on Tax Titles, 8–39; *Pasham* v. *Decatur County*, 9 Ga. 352.

If, therefore, the right to raise revenue and to sell land

for the payment of taxes are made legal and constitutional by virtue of the necessities of society and government, what tenable objection can be made to the validity of a law, which, taking note of an imposing public necessity and the physical conditions of our territory, accords to all persons engaged in agricultural pursuits a right of way over lands lying between their possessions and a stream of water.

Is not the necessity in this particular instance quite as imperative as in the other?

Every member of society is presumed to have assented to the public law by which his right of property is subjected to the dominion of strangers. The manner in which this power is to be exercised is specified in the law. The same law which creates this power bridles its execution. You may take my property to pay my debts, but you must ascertain that debt by judgment and a sheriff must execute the power. You may take my land to build a railroad, but you must pay me the value of it. And hence, while it may justly be said that a party has an unquestionable right, owing to the necessities of the country, to construct a ditch over the land of another, independent of any special law on the subject, yet the legislature, as the representative of that society into which each citizen enters, and in the entering of which he sacrifices so much of his rights for the purchase of social protection, may prescribe the method, terms and means whereby that right to construct the ditch shall be exercised. Of course these legislative provisions may be waived by the parties, as was done in this case. The construction of a ditch for irrigating purposes seems to me to rest on principles analogous to those which sustain the right of a private way over the land of another.

In *Parker* v. *Webster*, 2 Sid. 39, decided in Cromwell's time, it appeared that A had three parcels of land and there was a private way out of the first parcel to the second and out of the two first parcels to the third, and B purchased all these parcels and sold the two first to C. There was no way to the land not sold but through the other two parcels, and the court adjudged that the way continued from neces-

sity, and that the party was not liable in trespass for using it. In the case of *Snyder* v. *Warford*, 11 Miss. 513, the court held that a right of way of necessity exists in all cases in which an individual owns land surrounded by other lands excluding it from any public highway, and the case is made to rest upon the good and salutary principle that the right of a man in the use of his property is restricted by a due regard to the equal rights of others. The judge says: "It would seem to be no more than a principle of natural justice that his right of way should exist, although its existence may, to some extent, interfere with the absolute dominion of the coterminous proprietors. If not a principle of natural law, it is at least one which could not long be omitted in the code of a civilized people." See 3 Kent's Com. 423, marginal; *Holmes* v. *Seely*, 19 Wend. 506; *Capers* v. *Wilson*, 3 McCord, 170; *Cook* v. *Nearing*, 27 N. Y. 306.

I am fully aware that courts should be slow to justify their decisions on the ground of necessity; but I am equally conscious of the fact that they will betray their trust if, in the administration of law or in the expounding of constitutional principles, they shut their eyes and refuse to recognize those conditions of society which call into force and operation principles whose existence and recognition cannot be disregarded without bringing ruin on all. As has been well said by another, the law is not a system marked by folly, based on bald sentences, without reason; it is a grand code, founded on the necessities of men, erected by mature judgment, gradually expanding in beneficence and wisdom as time progresses, and regulating with care the interests of society and civilization. And so believing, I think the instructions given were erroneous, and that the judgment should be reversed and the cause remanded.

WELLS, J. I concur in the conclusion that the judgment given in the court below must be reversed, but, in so far as this conclusion is based upon a supposed estoppel, I dissent from what my brother BELFORD has said; and, in so far as

it is sought to rest it upon the statute concerning the irrigation of lands, I dissent from both my associates.

I conceive that, with us, the right of every proprietor to have a way over the lands intervening between his possessions and the neighboring stream for the passage of water for the irrigation of so much of his land as may be actually cultivated, is well sustained by force of the necessity arising from local peculiarities of climate; as in other countries, out of a like necessity, every proprietor has a way of right to his own close over the premises which shut it from the highway. But it appears to me that this right must rest altogether upon the necessity rather than upon the grant which the statute assumes to make. For in other countries, where the necessity does not exist, the right has not been recognized in the courts nor attempted to be confirmed by statute, and, where similar legislation has been attempted, in the instance of private ways, by statute, it has been held to be either void as an appropriation of private property to individual uses (*Taylor* v. *Porter*, 4 Hill, 140; *Osborn* v. *Hart*, 24 Wis. 89), or else has been sustained as the regulation of an existing right, and not as conferring one. *Snyder* v. *Warford*, 11 Mo. 513.

It seems to me, therefore, that the right springs out of the necessity, and existed before the statute was enacted, and would still survive though the statute were repealed.

If we say that the statute confers the right, then the statute may take it away, which cannot be admitted.

Doubtless the exercise of the right may be regulated by statute, but that is not the question here; and it appears to me unnecessary to determine the validity or effect of the existing legislation.

Reversed.

INDEX.

ABATEMENT:

1. PLEA IN ATTACHMENT CASES. The plea traversing the facts set forth in an affidavit for attachment is a plea in abatement. *Worrall* v. *Hare*, 91.

2. NONJOINDER OF DEFENDANTS MUST BE PLEADED IN ABATEMENT. Nonjoinder of defendants is never a bar but only matter in abatement. *Tiger* v. *Lincoln et al.*, 394.

3. PRACTICE — VARIANCE, HOW REACHED. A variance between the writ and declaration cannot be reached by demurrer. It is matter for plea in abatement. *Phelps* v. *Spruance*, 414.

4. WHAT IS MATTER FOR. If the person sued is not executrix and devisee, as charged, she may plead the fact in abatement. *Wise et al.* v. *Brocker*, 550.

ACKNOWLEDGMENT:

See DEED OF CONVEYANCE, 1.

ACTION:

1. CAUSES OF, THAT MAY BE JOINED. Demands due to a plaintiff in his own right and as survivor of another, may be joined. *Smith* v. *Salomon*, 176.

AFFIDAVITS:

Should not be sworn to before the attorney of the party making them. *Anderson* v. *Sloan*, 33. See PLEADING AT LAW, 21.

AGENT:

See PRINCIPAL AND AGENT.

AGREED CASE:

See PRACTICE AT LAW, 43; PRACTICE IN SUPREME COURT, 8.

AMENDMENT:

1. SHERIFF'S RETURN. A sheriff may amend his return to a summons by leave of the district court, after the record of the cause has been removed into this court. *Anderson* v. *Sloan*, 33.

2. APPEAL BOND — APPROVAL NOT AMENDABLE. The omission to procure the bond to be approved according to law cannot be supplied by amendment. *Orman et al.* v. *Keith et al.*, 81.

3. OF CAPTION OF INDICTMENT. If in the caption of an indictment the court is misdescribed, it may be amended on motion of the district attorney. *Farnum* v. *U. S.*, 309.

4. OF DECLARATION BY INCREASING AMOUNT OF AD DAMNUM. After trial and verdict in a cause, the court may, upon setting aside the verdict and granting a new trial, allow the plaintiff to amend the declaration by increasing the amount of *ad damnum*. *Good et al.* v. *Martin*, 407.

5. OF SHERIFF'S RETURN AFTER JUDGMENT. Upon leave of court a sheriff may amend his return on a summons at a term subsequent to that at which judgment was rendered, and after the record has been removed to the supreme court. *Loveland* v. *Sears*, 433.

6. OF RECORD AT A SUBSEQUENT TERM. Where an order allowing a bill of exceptions to be filed in vacation was omitted from the record by mistake of the clerk, the court may, at a subsequent term, allow the record to be amended by inserting such order *nunc pro tunc*. *Doane et al.* v. *Glenn et al.*, 454.

APPEAL BOND:

1. MAY BE AMENDED. On appeal to the district court from the judgment of a justice of the peace, if the appeal bond be adjudged insufficient the appellant may file an amended bond, and time should be allowed him for that purpose. *Gardner* v. *Dunn*, 1; *Lynn* v. *Merricle*, 3.

2. APPROVAL IN VACATION. An appeal cannot be approved in vacation without an order of court, and the approval of the clerk of the district court, given in vacation without such order, is inoperative. *Orman et al.* v. *Keith et al.*, 81.

3. WITHOUT CONDITIONS IN QUO WARRANTO PROCEEDING. To require a bond to be given, without prescribing conditions to the bond, is ineffectual, and the case is to be regarded as an appeal allowed without terms.

In such case failure to execute a bond, as required by the order of the district court, cannot be alleged as ground for dismissing the appeal. *Pollock et al.* v. *The People*, 83.

4. EXECUTION OF, BY CORPORATION. The bond of a corporation was executed by an attorney in fact appointed by the president, pursuant to a resolution of the executive committee of the corporation. Upon motion to vacate the order allowing supersedeas, *held*, that the bond was well executed. *Western Un. Tel. Co.* v. *Graham*, 183.

5. MAY BE AMENDED. If, on appeal from a justice of the peace, the bond was executed by the secretary of the district in good faith, but without authority from the district, it was amendable. The statute (Rev. Stat., ch. 50, § 45, 407) on this subject applies to every case in which an honest effort is made to appeal the cause. *School District No. 8 Jefferson Co.* v. *Erskin*, 367.

6. NOT AMENDABLE. If several defendants pray an appeal jointly, and the bond is executed by one only, it is not amendable. *Andre* v. *Jones*, 489.

APPEAL:

1. WILL NOT LIE FROM AN INTERLOCUTORY ORDER. An appeal cannot be prosecuted from an order overruling a demurrer to a bill in chancery. *Armor* v. *Lyon et al.*, 7.

2. FROM PROBATE TO DISTRICT COURT. The supreme court alone has revisory jurisdiction of the proceedings of probate courts, and an appeal will not lie from a judgment of a probate court to a district court. *Cass* v. *Davis*, 43.

3. NOT BASED UPON BILL OF EXCEPTIONS. An appeal may be prosecuted without bill of exceptions; imperfections in the latter cannot be alleged in support of a motion to dismiss. *Orman et al.* v. *Keith et al.*, 81.

4. IN QUO WARRANTO PROCEEDING. Under the act of 1861 concerning proceedings in cases of *quo warranto* (1 Sess. 351) an appeal lies in all cases from the judgment of the district court to this court, upon such terms as the district court shall prescribe. *Pollock et al.* v. *The People*, 83.

5. THE DISTRICT COURT may, in its discretion, allow an appeal without prescribing terms. Id.

6. BUT IF TERMS ARE PRESCRIBED, they must be such as relate to the subject matter of the controversy. Id.

7. WHEN PRAYED FOR. An appeal from a district court to this court must be prayed for within three days after judgment is rendered. *Freas* v. *Townsend*, 86.

8. HOW PRAYED FOR. If several defendants pray an appeal jointly, and the appeal bond is executed by one only, and recite an appeal by one, it is irregular, and the appeal will be dismissed. *Andre* v. *Jones*, 489.

9. EFFECT OF DISMISSAL UPON THE JUDGMENT. If an appeal is dismissed for the reason that the appeal bond was not filed within the time fixed by the district court, this will not operate to affirm the judgment, and a writ of error may be prosecuted to reverse the same judgment. *Hoe et al.* v. *Lois*, 187.

APPEARANCE.

See PRACTICE AT LAW, 13, 21, 22, 37, 47, 48, 52.

See RECORD, 7.

See ATTACHMENT, 5.

ARBITRAMENT AND AWARD.

See EVIDENCE, 6, 7.

ATTACHMENT:

1. DISTRIBUTING PROCEEDS OF ATTACHED PROPERTY AMONG CREDITORS. The twenty-sixth section of the attachment act provides for *pro rata* distribution of the proceeds of attached property among creditors who have sued out writs returnable, and returned to the same term of court. *Maloney* v. *Grimes*, 112.

2. WHERE SEVERAL CREDITORS attached the same property, under writs returnable to different terms of court, the rule of precedence, as modified by statute, requires that they should be classified with reference to the terms of court to which their writs are returnable, and gives preference to the several classes according to priority of service. Id.

3. If property is attached in several contemporaneous proceedings, whether commenced to the same term or to different terms, and whether the property be sold under process issued in one or all of the suits, the proceeds of the property should be distributed among the several creditors according to the foregoing rules. Id.

4. WHICH RECITES NO CAUSE IS IRREGULAR. That the defendants reside out of the county is no ground for issuing an attachment, and a writ, in which this is recited as the cause of attachment, is irregular on its face. *Nachtrieb* v. *Stoner*, 424.

5. IF DEFENDANT APPEAR PLAINTIFF NOT LIMITED TO AMOUNT SPECIFIED IN AFFIDAVIT. If, in such action the defendant withdraw his appearance, "without prejudice to the plaintiffs," the plaintiffs are not limited to the amount or causes of action specified in the affidavit in attachment, but may take judgment upon the declaration for an amount not exceeding the damages laid therein. *Creighton* v. *Kerr et al.*, 509.

6. NOTICE BY PUBLICATION, WHAT IS SUFFICIENT. Where the statute requires that notice of the pendency of an attachment suit shall be published in a newspaper for four weeks, it is not sufficient to publish such notice for twenty days. *Crary* v. *Barber*, 172.

ATTORNEY IN FACT:

See DEED OF CONVEYANCE, 2.

BAILMENT:

1. POSSESSION OF PLEDGEE EXTINGUISHED BY PAYMENT. Where the plaintiff pledged property to a third party to secure certain indebtedness, due from him to such party, and the defendant, in order to levy a writ of attachment upon the property, paid to the pledgee the amount due him from the plaintiff, when such payment was made the right of possession reverted to the plaintiff, and he may maintain trespass for the property. *Nachtrieb* v. *Stoner*, 424.

2. POSSESSION OF PLEDGEE DETERMINED BY SETTING UP ADVERSE TITLE. In such case the defendant, having set up a title inconsistent with the lien, cannot claim to have acquired the pledgee's right of possession and hold under the lien. Id.

BILL OF EXCEPTIONS:

1. AMENDMENT OF RECORD. If bill of exceptions is omitted from record by mistake, the omission may be supplied at a subsequent term. *Doane et al.* v. *Glenn et al.*, 454.

2. WHEN NECESSARY. Instructions to the jury and a motion for new trial must be preserved in the record by bill of exceptions, and, if not preserved, error cannot be asigned upon them. *Kurtz* v. *Simonton*, 70; *Smith et al.* v. *Cisson*, 29; *Smith* v. *The People*, 121; *Anderson* v. *Sloan*, 33.

3. WHEN NECESSARY. The copy of a note attached to a declaration, and inserted in the transcript of the record by the clerk, is no part of the record. It should be embodied in a bill of exceptions. *Cook* v. *Hughes*, 51.

4. DEFECTIVE. If evidence, offered by a defendant to disprove the plaintiff's case, is excluded by the court, the bill of exceptions should contain the

evidence given on behalf of the plaintiff, in order that this court may determine the relevancy of the evidence so excluded. *Kinnear* v. *Tucker et al.*, 74; *Watson* v. *Hahn*, 494; *Cook* v. *Hughes*, 51.

5. WHEN TO FILE BILL OF EXCEPTIONS. A bill of exceptions filed in vacation, there being no order of court to authorize it, is no part of the record. *Orman et al.* v. *Keith et al.*, 82.

6. DIMINUTION OF RECORD — WILL NOT BE NOTICED IF ERROR APPEAR. A bill of exceptions in the record was not questioned, but it was alleged that another bill of exceptions remained in the court below. Error appearing in the bill of exceptions contained in the transcript on file, a suggestion of diminution of the record will not be noticed. *Jones* v. *Carothers*, 291.

7. IN TRIAL TO THE COURT WITHOUT A JURY. If a cause is tried to the court without a jury, exception must be taken to the judgment of the court, if the party aggrieved wishes to have it reviewed in this court.

In such case a motion for new trial is unnecessary, but the exception to the judgment of the court is indispensable if that judgment is to be reviewed here. *Phelps* v. *Spruance*, 414.

8. WHEN TO BE SIGNED. A bill of exceptions must be signed in term time unless a day in vacation is allowed by order of court. *Murphy* v. *Cunningham*, 467.

9. RECORD OF EXCEPTIONS — HOW MADE. Exceptions to the rulings, opinions and decisions of the court form no part of the record until they are reduced to writing, and signed and sealed by the judge.

And if no exception to the ruling or decision of the court is taken at the trial, the ruling or decision cannot be put on record. *Smith* v. *The People*, 121.

BILLS OF EXCHANGE AND PROMISSORY NOTES:

1. PROMISSORY NOTE — PARTY INDORSING AT THE TIME IT IS MADE, MAY BECOME MAKER. If a party put his name on the back of a note at the time it is made, as surety for the maker and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note. *Good* v. *Martin*, 165.

2. BILL OF EXCHANGE — ORDER FOR LUMBER IS NOT. An order for lumber, drawn by S. upon R., is not a bill of exchange, and the drawer is not liable upon it. *Scudder* v. *Clarke*, 192.

3. PROMISSORY NOTE — ALL ARE NEGOTIABLE. Under our statute (Rev. Stat., ch. 10), all promissory notes and instruments for the payment of money are negotiable, whether so expressed or not, and a note which does not contain the words "or order," is negotiable in the same manner as if it did contain those words. *Thackaray* v. *Hanson*, 365.

4. ASSIGNOR OF PROMISSORY NOTE — LIABILITY OF. To charge the assignor of a note suit must be instituted against the maker, at the first term of any court having jurisdiction of the amount, and prosecuted with reasonable diligence to judgment, and the property of the maker, so far as found, must be subjected to the judgment.

UNDER THE STATUTE OF THIS TERRITORY the assignor of a promissory note cannot be made liable to the assignee upon notice of dishonor by the maker merely. *Watson* v. *Hahn*, 386.

5. DILIGENCE — IN PROSECUTING MAKER OF THE NOTE. If the holder of a note obtain judgment by confession of the maker, soon after the maturity of the note, and stay execution thereof, the court will not consider whether execution was obtained as soon as it could have been obtained in the due course of law. In such case the stay of execution is made at the peril of him who grants it.

DELAY OF SEVENTY DAYS after judgment in obtaining execution is not due diligence. Id.

6. DILIGENCE AGAINST MAKER — WHAT WILL DISCHARGE ASSIGNOR. Lack of diligence in prosecuting the maker of a note will not discharge the assignor, unless it has been prejudicial to him.

As a judgment is a lien upon real estate for one year after rendition, and longer, if execution is obtained within the year, execution issued seventy days after judgment may be sufficient to secure the real estate of the maker.

But execution is necessary to secure the personal property of the maker, and if there was delay in issuing execution, in order to show that such delay was not prejudicial to the assignor, it should be averred that all the personalty of the maker was ultimately secured, or that he had no such estate at the time judgment was entered. Id.

7. CONSIDERATION — EQUITABLE RIGHT WILL SUPPORT EXPRESS PROMISE. If the remedy, by second indorsee of a promissory note against first indorser, is in equity alone, this equitable right is sufficient to support an express promise upon which he may recover at law. *Watson* v. *Hahn*, 494.

8. INTEREST ON PROMISSORY NOTE. Upon a note payable in thirty days, "with ten per cent interest per month," interest was allowed at the rate specified, until maturity, and, after maturity, at the rate of ten per cent per annum. *Clark* v. *Russell*, 52.

9. EVIDENCE OF PAROL ASSIGNMENT IN ACTION BY ONE TO USE OF OTHERS. In an action upon a promissory note, brought by one for the use of others, it is not necessary at the trial to prove a parol assignment of the note to the persons to whose use the suit is prosecuted. *Cody* v. *Butterfield*, 378.

10. AGENTS — WHAT SIGNATURE WILL BIND PRINCIPAL. If an agent sign a bill of exchange in this form, "T. R. T., agent for S. T.," and there is nothing in the body of the bill evincing an intention to bind the principal, the agent shall be regarded as the drawer of the bill. *Tannatt* v. *R. M. National Bank*, 278.

BILL OF PARTICULARS:

See PRACTICE AT LAW, 26, 39.

CHANCERY:

1. MORTGAGE — NOT ASSIGNABLE AT LAW. The assignee of a mortgage has no remedy upon it at law, except it be treated as an absolute conveyance and the mortgagee convey the premises by deed. *Longan* v. *Carpenter*, 205.

2. SAME — ASSIGNABLE IN EQUITY. But if a promissory note secured by mortgage is assigned, the assignee will hold the mortgage subject to the equities existing between the mortgagor and mortgagee at the date of the assignment. Id.

3. MORTGAGE ASSIGNED — RIGHTS OF PARTIES. At law the innocent holder of a negotiable note may recover the amount thereof; but if the note is secured by mortgage and the holder seeks to foreclose the mortgage, the mortgagor can avail himself of any payments made to the mortgagee before the assignment. Id.

4. A PROMISSORY NOTE SECURED BY MORTGAGE and by pledge of personal property was assigned before maturity to a *bona fide* purchaser. Previous to the assignment a portion of the pledged property was sold by the payee, but no credit was indorsed on the note. In a suit by the assignee to foreclose the mortgage, *held*, that the mortgagor was entitled to be credited with the amount realized by the payee from the sales of the pledged property. Id.

See SPECIFIC PERFORMANCE.

CHANGE OF VENUE:

1. SUFFICIENCY OF PETITION. Where several counties are attached for judicial purposes, a petition for change of venue, founded upon prejudice of the inhabitants, must show that such prejudice exists in all of the counties so attached. *Fitzgerald* v. *The People*, 56.

2. SECOND APPLICATION. A second application in the same cause, for change of venue, is addressed to the discretion of the court, and error cannot be assigned upon refusal to grant it. Id.

CHATTEL MORTGAGE:

See MORTGAGE, 5, 6 and 7.

CITY ORDINANCES:

WHEN REASONABLE. Where authority was conferred upon a corporation to suppress and prohibit the sale of intoxicating drinks, as well as to license the same, an ordinance which imposes a penalty for selling such drinks without license, which penalty exceeds that fixed by the general law of the territory, is reasonable. *Deitz* v. *City of Central*, 323.

CONSTITUTIONAL LAW:

1. MECHANIC'S LIEN. Liens established by the act of 1864 are not protected from legislative interference by the clause of the constitution of the United States which relates to the obligation of contracts. *Woodbury et al.* v. *Grimes et al.*, 100.

2. TERRITORIES. It seems that paragraph 17, section 8, article 1 of the constitution of the United States is not applicable to the territories. *Reynolds* v. *The People*, 179.

3. POWERS OF THE FEDERAL AND TERRITORIAL GOVERNMENTS. The fact that the general government has legislative authority in the territory tends not to diminish or displace the authority of the territorial government, but to establish it. Id.

4. LEGISLATIVE POWER — TO CREATE A CITY. Under the organic act the legislative assembly has power to establish a municipal corporation. *Deits* v. *City of Central*, 323.

5. LEGISLATIVE POWER — TO CHANGE THE OFFICIAL TITLE OF A JUSTICE OF THE PEACE. The legislative assembly has no power to confer upon a justice of the peace a denomination not warranted by the organic act, and, in so far as the charter of the City of Central confers upon the justice of the peace exercising jurisdiction under the ordinances thereof the name of police magistrate, it is void. Id.

CONSTRUCTION OF CONTRACT:

1. INTEREST ON PROMISSORY NOTE. Upon a note payable in thirty days, "with ten per cent interest per month," interest was allowed at the rate specified, until maturity, and, after maturity, at the rate of ten per cent per annum. *Clark* v. *Russell*, 52.

2. OF MORTGAGE MUST BE SUCH AS WILL GIVE EFFECT TO THE WHOLE INSTRUMENT. A mortgage in terms defeasible upon payment of a note for $100, but which, by another clause, appears to have been intended as a security for past indebtedness, will be construed so as to bring the clause relating to past indebtedness within the terms of the defeasance. *Machette* v. *Wanless*, 225.

3. Contract for payment of $600 in four months and an additional $600 upon the sale of certain mining property. Comments and construction. *Cheney* v. *Barber*, 256.

4. OF REVENUE LAW OF 1864. As to contracts made after the law of June 30, 1864 (13 Stat. at Large) was passed, the law will presume that the two and one-half per centum, mentioned in section 108 of that act, is included in the rate specified in the contract, and a carrier of goods for hire cannot recover the tax in addition to the contract price. *Clayton* v. *Smith*, 95.

CONTRACT:

1. EXPRESS — MAY BE ABANDONED FOR CAUSE. A party may for good cause, and where the fault is not his own, abandon a special contract and recover the value of services upon an implied assumpsit. *Cody* v. *Raynaud*, 272.

2. EXPRESS — IF ABANDONED, PLAINTIFF MUST RESORT TO IMPLIED. In such case the law raises a contract for the protection of the innocent party, and the express contract is not involved except for the purpose of ascertaining whether there was cause for abandoning it. Id.

3. EXPRESS — ABANDONED WITHOUT CAUSE. Where a special contract was entered into, by which the plaintiff agreed to serve the defendant for the term of one year, if the plaintiff voluntarily and without the fault of the defendant quit the service of the defendant, she cannot recover.
THE SPECIAL CONTRACT BEING SHOWN, it ought to appear that there was sufficient cause for abandoning it. Id.

4. RELEASE OF DEFENDANT BY ACCEPTING THIRD PARTY. In an action for the price and value of goods, the defendant alleged that he purchased the goods as agent for B., and it appeared that some time after the purchase was made plaintiffs rendered an account to B. in which he was charged with the balance of defendant's bill, for which action was brought. There being no evidence to show that plaintiffs agreed to accept B. as their debtor, or that B. agreed to pay the debt, the defendant was not thereby discharged. *Tiger* v. *Lincoln et al.*, 396.

5. PROHIBITED BY LAW, WHEN VOID. A contract to do a thing prohibited by statute is not necessarily void if the statute visit the unlawful act with a penalty. If the thing prohibited is *malum in se*, the contract cannot be enforced, but as to things not immoral or against public policy, it may be sufficient to enforce the statutory penalty only. If it was not the intention of congress to make void a contract made contrary to the provisions of the act it will be enforced, and for the violation of law the penalty which the statute gives may be applied. Whatever consequences are to follow the violation of the act are expressed in the act itself, and one penalty being given the court is not at liberty to add another. *Union Gold Mining Co.* v. *R. M. Nat. Bank*, 582.

6. PROHIBITED BY LAW — RECOVERY ON. An action may be maintained by a national bank to recover money loaned exceeding in amount one-tenth part of its capital stock, notwithstanding the prohibition of section 29 of the act under which it was organized. Id.

7. CONSIDERATION. If the remedy by second indorsee of a promissory note against first indorser is in equity alone, the equitable right is sufficient to support an express promise. *Watson* v. *Hahn*, 494.

8. INTEREST ON DEMAND SECURED BY LIEN. A debtor may agree to pay interest on demand secured by mechanic's lien as well as upon any other, and, whatever its effect among creditors, the debtor cannot object to pay the interest. *Clear Creek Mining Co.* v. *Root*, 374.

9. PLEADING — CONTEMPORANEOUS AGREEMENT AS DEFENSE TO A NOTE. In an action on a promissory note if the defendant sets up a contemporaneous agreement modifying the note, he must allege in his plea that the agreement was in writing. *Peddle* v. *Donnelly*, 421.

CONTINUANCE:

1. TO OBTAIN TESTIMONY OF ABSENT WITNESS — NECESSARY DILIGENCE. Upon affidavit for continuance on the ground of absence of witness, it appeared that defendant entered appearance Oct 12, 1869; that he was not informed as to location of witness until January 29, 1870. *Held*, that affidavit was defective in not showing that inquiry was made for the witness between those dates. *Litchfield* v. *Daniels*, 268.

2. AFFIDAVIT MUST SET OUT MATERIAL FACTS. If the facts set out in an affidavit for continuance are not competent in defense under the state of the pleadings, the continuance should be denied. *Thackaray* v. *Hanson*, 365.

3. In an action on a promissory note, one of the defendants moved for continuance upon the ground that an absent witness would testify that the words "president" and "secretary" had been cut from the signatures to the note. These facts were not material except to show that the note was executed on behalf of a corporation, and was not the note of the defendants. The execution of the note was not denied by plea, verified by affidavit, and therefore the evidence was not admissible, and the motion for continuance was properly overruled. *Thackaray* v. *Hanson*, 365.

4. TO OBTAIN TESTIMONY OF ABSENT WITNESSES. A party seeking a continuance to obtain the testimony of absent witnesses must, in his affidavit, set forth the facts to be proven with such particularity that the opposite party may, if he see fit, admit them and proceed to trial. *Cady* v. *Butterfield*, 377.

5. ACTION UPON A PROMISSORY NOTE; defense, that note was given for the carriage of certain goods which were damaged *in transitu* through the negligence and carelessness of the carrier. Affidavit for continuance to obtain testimony of absent witnesses did not set forth to what extent the goods were injured, nor that the defendant could show, by these or other witnesses, the amount of the damage occasioned by the alleged negligence of the plaintiff nor what the amount of this damage was. *Held*, that the continuance was properly denied. *Cody* v. *Butterfield*, 378.

6. THE PARTY SEEKING A CONTINUANCE ought to make it appear affirmatively to the court, not only that, upon a possible or supposable state of facts, the testimony may become important, but that, upon the facts as they are, it is and will be so. Id.

7. DILIGENCE IN OBTAINING DEPOSITIONS. Where the issues were made up in February, 1868, and application for continuance in June, 1869, and the defendant made no effort to obtain the testimony of absent witnesses until some three months before the sitting of the court, there was not sufficient diligence.

The matter of diligence in obtaining testimony discussed. Id.

8. TO OBTAIN TESTIMONY OF ABSENT WITNESS. Where a witness departs from the territory without the knowledge of the party desiring his testimony within a few hours after the commencement of suit, the failure to serve him with subpœna cannot be regarded as negligence. *Hirsh* v. *Ferris*, 402.

9. Where process was served July 10th, and motion for continuance was made 17th August, following, and it was alleged that negotiations for settling the matter in controversy had been carried on in the interval with reasonable hope of success, the cause should have been continued to enable the defendant to take the deposition of an absent witness. Id.

CORPORATIONS:

1. REGULATIONS BY TELEGRAPH COMPANY RESPECTING THEIR BUSINESS. Telegraph companies may make reasonable regulations concerning their business, but cannot by such rules relieve themselves from responsibility for the negligence of their servants. *West Un. Tel. Co.* v. *Graham*, 230.

2. REGULATION NOT APPLICABLE. That the plaintiff did not cause a message to be repeated, as required by a regulation of the company, is no defense to an action for a failure to deliver the message after it was received at the office to which it was addressed. Id.

3. DISSOLUTION IN COLLATERAL PROCEEDING. A corporation cannot be dissolved in a collateral proceeding; and in a suit by a National Bank to recover money loaned, if the corporation has not been dissolved in a direct proceeding to that end, the defendant cannot question its existence. *Union Gold Mining Co.* v. *R. M. Nat. Bk.*, 531.

4. DISSOLUTION OF A NATIONAL BANK. According to section 53 of the act relating to National Banks (13 Stat. at Large, 99), a forfeiture of the rights and privileges of a banking association must be determined and adjudged in a suit instituted by the comptroller of the currency in his own name, and an association organized under that act must stand until dissolved in that way. Id.

5. POWER OF PRESIDENT. The president of a corporation has power to convene the board of directors for the purpose of laying before them any matter affecting the business of the corporation. Id.

6. LEGISLATIVE POWER — TO CREATE A CITY. Under the organic act the legislative assembly has power to establish a municipal corporation. *Deitz* v. *City of Central*, 823.

7. AUTHORITY OF PRESIDENT. An undertaking of the president of a corporation to bring before the board of directors, at a time specified, a demand against the corporation for money borrowed by an agent of the corporation, is within the scope of his authority as president, and the corporation is bound to consider the demand at the time specified. *Union Gold Mining Co.* v. *R. M. Nat. Bk.*, 532.

COSTS:

1. NOT ALLOWED WHEN AMOUNT HAS BEEN TENDERED BEFORE SUIT. Where the jury find that, before suit brought, the amount found to be due the plaintiff was tendered to him, he cannot recover costs. *Leis* v. *Hodgson*, 393.

2. ON APPEAL FROM JUSTICE OF THE PEACE — POWER TO APPORTION DISCRETIONARY. The power conferred by section 16, chapter 19, Revised Statutes, 156, to apportion costs on appeal from justice of the peace, is to be exercised in the discretion of the district court, and error cannot be assigned upon the ruling of the district court in relation thereto. *Murphy* v. *Cunningham*, 467.

3. PRACTICE — COSTS DENIED. Where a motion for new trial has not been presented in the time and manner directed by the court the party in fault will not be allowed costs. *Kinney* v. *Williams*, 191.

4. WILL NOT BE ALLOWED TO PARTY IN FAULT. Where the error complained of was occasioned by the negligent act of the attorney for plaintiff in error costs will not be allowed. *Haskins* v. *Tucker et al.*, 263.

CRIMINAL LAW:

1. HOMICIDE — INTENT — UNLAWFUL ACT. If two or more persons combine to do an unlawful act, and in the prosecution of the unlawful design

death ensue to any, the killing will be murder as to all of the participants in the unlawful purpose.

THE PRISONER HAVING MADE A VIOLENT ASSAULT upon deceased and having assisted in carrying away and concealing deceased's body, even if the killing was done by another, the prisoner must be regarded as aiding, abetting and assisting in the perpetration of the crime. *Smith* v. *The People*, 121.

2. CONSTRUCTION OF THE ACT OF 1870 RELATING TO HOMICIDE. The words "deliberate and premeditated" in the act of 1870, relating to homicide, refer to the intention of the accused at the time of the killing. *Hill* v. *The People*, 436.

3. INTENTION IS MATTER OF FACT TO BE PROVED. Under the act of 1870, the intention of the accused at the time of the killing is to be ascertained by the jury upon the evidence, and cannot be made the subject of legal presumption or inference.

INTENTION — PRESUMPTION OF FACT. The intention of the accused may be inferred from the circumstances attending the homicide, and is therefore the subject of a presumption of fact.

Whether the intention be shown by evidence of antecedent menaces, former grudges, lying in wait, the means employed to effect the homicide or any other circumstance, the evidence is to be submitted to the jury to find the fact under the direction of the law.

A man shall be presumed to intend that which he voluntarily does, and an intention to take life is shown by the use of a deadly weapon.

So, also, if after a quarrel with deceased the prisoner went away and armed himself, and returned to the scene of the combat, intending to renew the altercation and quarrel with deceased, or to place himself in the presence of deceased with the purpose to provoke deceased to renew such quarrel, and in such quarrel to make use of the pistol in repelling the assault of deceased, the intention of the prisoner to take the life of deceased is shown. Id.

4. REASONABLE DOUBT IN CASES OF HOMICIDE. In a criminal cause, where the defense is based upon the facts and circumstances growing out of the charge itself, the burden of proof remains on the government throughout, to satisfy the jury of the guilt of the defendant.

In such case it is error to charge the jury that circumstances of mitigation, justification or excuse, must be established by a fair preponderance of testimony, and that doubt as to whether the killing was in heat of blood or with malice, would not be sufficient to acquit of the charge of murder. *Hill* v. *The People*, 437.

5. EVIDENCE AS TO DRUG OR LIQUID ADMINISTERED IN CRIMINAL ABORTION. If the drug or liquid administered is described in the indictment, it is not necessary that the proof should correspond with the allegation.

EVIDENCE AS TO EFFECT OF THE POTION. Nor is it necessary that miscarriage should be produced. If the noxious substance or liquid is administered *with intent* to produce miscarriage, the crime is complete.

EVIDENCE AS TO POWER OF POTION TO PRODUCE INTENDED RESULT. Nor is it necessary that the noxious substance or liquid administered should be poisonous, as the term is commonly understood, or that it should be capable of producing miscarriage.

If the substance administered is unwholesome, and may probably occasion injury or derangement of the system to a woman pregnant with child, it is noxious within the meaning of the statute. *Dougherty* v. *The People*, 514

6. CONSTRUCTION OF SECTION 12, ACT OF 1864 — WHAT IS AN OFFENSE BY MAIL CARRIER. A mail carrier who secretes, embezzles or destroys a letter, packet, bag, or mail of letters intrusted to him to be carried, offends against the first clause of section 12 of the act of 1864 (13 Stat. at Large, 336), and if the letter, packet, bag or mail of letters contain any article of value, he offends against the last clause of that section.

INDICTMENT UNDER SECTION 12, ACT OF 1864 — WHAT IT MUST CONTAIN. In order to convict under the last clause of that section, it must be alleged in the indictment that the letter, packet, bag, or mail of letters contained an article of value.

EVIDENCE — UNDER SAME SECTION. And the evidence must support the allegation at the trial. *Farnum* v. *U. S.*, 309.

7. UPON INDICTMENT FOR MAYHEM. The jury were instructed that, if the injury was inflicted during a fight between the prisoner and the prosecuting witness had by consent, and the prisoner was the assailant, or the prosecuting witness declined further combat at the time the fact occurred, the prisoner was guilty. This charge, if applied to the higher offense, is erroneous, but, if applied to the inferior offense, it is too favorable to the prisoner. *Foster* v. *The People*, 293.

8. JUDGMENT — WHEN DEFENDANT MAY BE IMPRISONED. Where the charter provides that if the defendant has no property whereof the judgment can be collected, the defendant may be committed to jail, it is error to enter judgment that the defendant stand committed until the fine and costs are paid. In such case execution should be awarded, and if no property can be found the defendant may be committed to jail. *Deitz* v. *City of Central*, 324.

9. LICENSE ISSUED BY CITY NO DEFENSE TO PROSECUTION UNDER GENERAL LAW. In an indictment, under the act of 1861 concerning licenses, for selling spirituous liquors without license within the limits of the city of Black Hawk, a license issued under the charter and ordinances of that city cannot be shown in defense. *Patton* v. *The People*, 78.

10. CONSTRUCTION OF SECTION 3 OF ACT OF CONGRESS OF 1790 RELATING TO CRIMES. The Territory of Colorado is not a place or district of country under the sole and exclusive jurisdiction of the United States within the meaning of section 3 of the act of congress of 1790. 1 Stat. at Large, 113. *Franklin* v. *U. S.*, 35.

See INDICTMENT.

DAMAGES:

1. MEASURE OF DAMAGES IN ACTION FOR NON-DELIVERY OF TELEGRAM. In an action against a telegraph company to recover damages for the non-delivery of a telegram, in which the plaintiff requested his agents at Nebraska City to "ship oil soon possible," the plaintiff cannot recover the profits which he might have made on the oil if the message had been delivered, and the oil sent in due time.

IN SUCH ACTION the plaintiff may recover the money paid by him for transmitting the message, the advance in the price of freight, and his expenses incurred by reason of the failure of the defendant to fulfill the contract. *West. Un. Tel. Co.* v. *Graham*, 230.

2. FOR DETENTION OF PROPERTY. In an action on a replevin bond, in which it is assigned for breach of the condition of the bond that the principal did not prosecute the replevin suit with effect, damages for the detention of the property replevied may be recovered. *Sopris* v. *Lilly et al.*, 266.

3. MEASURE OF DAMAGES IN TRESPASS. In trespass *de bonis* the plaintiff may recover the highest market price of the goods taken. *Deitsch* v. *Wiggins et al.*, 300.

4. MEASURE OF DAMAGES — ON PROMISSORY NOTE. In action against indorser of a promissory note, judgment having been obtained against the maker, the amount of the judgment, with interest, is the measure of damages unless the indorser show that the recovery was wrongful. *Watson* v. *Hahn*, 385.

5. ALLOWED WHERE WRIT HAS BEEN PROSECUTED FOR DELAY. It appearing that the writ of error was prosecuted for delay, twenty per cent of the amount of the judgment below was awarded to the defendant in error. *Shallcross* v. *Kretschmer*, 493.

6. IN TRESPASS DE BONIS. Where it appears that the defendant procured an inferior court to issue an attachment in a case not warranted by law, and to give judgment upon constructive service for a fictitious demand, and sell property of plaintiff of the value of $300, a verdict of $750 damages is not excessive. *Nachtrieb* v. *Stoner*, 423.

7. IN REPLEVIN FOR DETENTION. If no evidence of the value of the property or of the value of its use is given, no more than nominal damages can be allowed for the detention thereof. *Sopris* v. *Webster*, 507.

DEED OF CONVEYANCE:

1. VALID WITHOUT ACKNOWLEDGMENT. A conveyance is valid between the parties thereto and those having notice thereof, though not acknowledged.

In ejectment by a grantor against one who claims title under his grantee, if the execution of the deed is admitted, no question can be raised respecting the certificate of acknowledgment.

2. WHAT IS SUFFICIENT SIGNING BY ATTORNEY IN FACT. Where the christian name of an attorney in fact is inserted in the power of attorney and in the deed, a signature to the deed, in which the initial letter of such christian name is used, is sufficient. *Holladay* v. *Datley*, 460.

3. PUBLIC POLICY. It is against public policy that land records should be incumbered by invalid conveyances, purporting to be executed by persons incapable in law, and so holding out empty promises. Id.

DEMURRER:

See PRACTICE AT LAW, 4, 5, 6, 7, 31, 33, 45.
See PRACTICE IN SUPREME COURT, 45.
See PLEADING AT LAW, 3, 25.
See PLEADING AND EVIDENCE, 16.
See PRACTICE IN CHANCERY, 10.
See JUDGMENT, 3.

DESCENTS:

1. KANSAS TERRITORY, LAWS OF, RELATING TO DESCENT OF REAL ESTATE. In November, 1860, there were three statutes in Kansas relating to the descent of real estate. By the first, the widow had one-half the real estate of her deceased husband, the other half going to the children of the marriage and of the husband. By the second, she had one-half in value of the realty to be set apart to her under the direction of the court. By the third, she was endowed of the third part of all the lands whereof her husband was seized, of an estate of inheritance during coverture. She was required to elect between these acts within six months after the death of her husband. *Crandall* v. *Sterling Gold Mining Co.*, 106.

2. ELECTION — EFFECT OF WIDOW'S FAILURE TO MAKE. In ejectment by a widow claiming as heir to her deceased husband's estate under the first of the acts mentioned, it did not appear that she had declared her election to take under that statute within the time prescribed. *Held*, that she could not recover. Id.

DEPOSITIONS:

See EVIDENCE, 22, 28, 29.
See PRACTICE AT LAW, 35, 56.

DISTRICT ATTORNEY:

DISTRICT ATTORNEY — QUALIFICATIONS. Whether one who was not a licensed attorney at the time of his election was eligible to the office of district attorney, the court was not agreed. *The People* v. *Hallett*, 352.

DOWER:

RIGHT OF — NOT KNOWN. In this territory a wife has no dower in the real estate of her husband. 1 Sess. 363. *Holladay* v. *Datley*, 460.

EASEMENT:

See IRRIGATION OF LANDS.

EVIDENCE:

1. PRESUMPTION IN SUPPORT OF JUDGMENT OF COURT BELOW. In an action against two defendants named Smith, the record did not disclose whether the parties were sued as copartners or otherwise. At the trial the defendants put in an account in which they used the name of "Smith Bro." and a receipt in which they are styled "P. Smith & Co." Upon this evidence it will be presumed that the defendants were sued as copartners. *Smith et al.* v. *Cisson*, 29.

2. PRESUMPTION IN SUPPORT OF JUDGMENT. This court will presume that the evidence in the court below was sufficient to support the declaration, unless the contrary appear. *Cook* v. *Hughes*, 51; *Kinnear* v. *Tucker et al.*, 74.

3. AGENT — WHAT DECLARATIONS WILL BIND PRINCIPAL. Declarations of an agent are not admissible in evidence against his principal if made after the transaction to which they refer. *Anthony* v. *Estabrook*, 75.

4. Where a horse was hired to go a journey and died on the way, declarations of the driver, who was the agent of the hirer, made after the death of the horse and after the driver had returned from the journey, are not admissible to charge the hirer. Id.

5. JUDICIAL NOTICE — LAWS OF KANSAS TERRITORY. If the laws of the late territory of Kansas, relating to the descent of real estate, were at any time in force in this territory, they are to be judicially noticed, and need not be proved at the trial. *Crandall* v. *Sterling Gold Mining Co.*, 106

6. ARBITRAMENT — EVIDENCE OF SUBMISSION. A certificate of a county clerk, to the effect that a controversy relating to a mule was submitted to him by agreement of the parties claiming the mule, is not evidence that the parties did so agree. *Howard* v. *Sherwood*, 117.

7. POSSESSION — ILLEGAL AWARD — EVIDENCE. A certificate of a county clerk, to the effect that a controversy relating to a mule was submitted to him by agreement of parties, and that the property was awarded to the defendant, cannot be given in evidence to show that the possession of the defendant was lawful. Id.

8. DEMAND AND REFUSAL IN REPLEVIN — EVIDENCE. In an action of replevin it appeared that plaintiff demanded the property from the defendant the day before the suit was commenced, and the defendant agreed to take the property to a place named on the following day. On the following day the suit was commenced and the defendant contested it at every step. *Held*, that there was sufficient evidence of demand and refusal. Id.

9. It is not necessary that a defendant in replevin should expressly refuse to comply with a demand for property. If he neglect to deliver it and contest the suit, he cannot, after verdict, be permitted to say that he intended to avoid litigation by surrendering the property before the suit. Id.

10. EVIDENCE OF PENDENCY OF SUIT. Whether a suit was pending, as described in a contract at the time therein mentioned, was provable by the records of the court in which it was alleged to be pending. *Armor* v. *Fisk*, 148.

11. IN ORDER TO CHARGE THE INDORSER of a note as maker, it was necessary to show specifically that he put his name upon the back of the note before it was delivered to the payee. *Good* v. *Martin*, 165.

12. PRESUMPTION ARISING FROM INDORSEMENT AT TIME NOTE IS MADE. If one put his name on the back of a note at the time it is made, and make no statement of his intention in so doing, he is presumed to have done so as the surety of the maker and for his accommodation, and to give him credit with the payee. Id.

13. FORMER RECOVERY — CONCLUSIVE. In an action of replevin it appeared that the property in dispute had been the subject of another suit, and the record of that suit being introduced in evidence a verdict contrary to the judgment in the first suit will not be sustained. *Carothers* v. *Jones*, 196.

14. STAMPS — NEED NOT BE CANCELED. An instrument which has been stamped according to the revenue laws of the United States may be read in evidence, although the stamp thereon has not been canceled. *Patterson* v. *Gile*, 200.

15. REPLEVIN FOR MORTGAGED CHATTELS. In an action of replevin by a mortgagee to recover possession of the chattels mortgaged, the defendant cannot defeat the action by showing that a portion of the indebtedness mentioned in the mortgage has been paid. *Machette* v. *Wanless*, 225.

16. REPLEVIN — DEFENSE ARISING AFTER SUIT BROUGHT. In replevin by a mortgagee to recover possession of the mortgaged chattels, the defendant cannot defeat the action by showing that a portion of the indebtedness was paid after suit brought. Id.

17. OFFICIAL CHARACTER OF SHERIFF. Whatever rule may be enforced against an officer justifying under process, it seems to be sufficient for third persons to show that he is an officer *de facto*, and a plaintiff in attachment who is sued in trespass is not bound to show that the sheriff who levied the

writ was an officer *de jure*. It is sufficient for him to show that the sheriff was performing the duties of the office and generally recognized in it. *Berry* v. *Hart et al.*, 246.

18. OF ABANDONMENT OF CONTRACT. As to the cause for abandoning a special contract it is not enough that a witness should testify that plaintiff quit defendant's employment because of abusive language and bad treatment. Specific acts of defendant should be proved. *Cody* v. *Raymaud*, 273.

19. OF ACQUIESCENCE IN PLAINTIFF'S DEMAND. Where the plaintiff proved a contract for service which had not been performed, and it appeared that at or about the time the plaintiff quit defendant's service the defendant requested the plaintiff to remember that she had left and had not been discharged, the circumstance that the defendant made no objection to a bill for services rendered, which was subsequently presented by the plaintiff, is not sufficient to show an agreement on the part of the defendant to pay the same. Id.

20. TO EXPLAIN AGENT'S SIGNATURE. If an agent sign a bill of exchange "T. R. T., Agent for S. T.," and there is nothing in the body of the bill showing an intention to bind the principal, parol evidence cannot be received to show such intention. *Tannatt* v. *R. M. Nat. Bank*, 278.

21. MARRIED WOMAN'S OWNERSHIP OF PROPERTY MUST BE PROVED. Where husband and wife are living together, and there is no evidence as to the ownership of provisions and articles of household use, the presumption is, that they belong to the husband. *Allen* v. *Eldridge*, 287.

22. DEPOSITIONS — TAKEN WITHOUT NOTICE. Unless notice of the time and place of taking depositions be given to the opposite party, they cannot be read upon trial of the cause. *Jones* v. *Caruthers*, 291.

23. UPON INDICTMENT FOR ROBBING THE MAIL. Upon indictment against a mail carrier for secreting and embezzling letters under the last clause of section 12, act of 1864, the evidence must show that the letter packet, bag or mail secreted or embezzled contained an article of value. *Farnum* v. *U. S.*, 309.

24. BY PAROL OF CONTENTS OF RECORD. Parol evidence is not admissible to prove the amount of a judgment or the cause of action upon which it was recovered. The record or a transcript therefrom must be produced. *Watson* v. *Hahn*, 385.

25. TO DISPROVE PLAINTIFF'S CASE. In an action of unlawful detainer against a tenant holding over, for the purpose of disproving the tenancy, the defendant may show that he entered as a purchaser and not as a tenant, and this whether the agreement to purchase was good or bad. *Klopfer* v. *Keller*, 410.

26. OF DECLARATIONS OF PARTIES IN CHARGE OF PROPERTY TO SHOW POSSESSION. On the trial of an issue as to ownership of property, between interpleading claimants and plaintiffs in attachment, the declarations of the claimants and others who were present with the property, made to the officer at the time the writ was levied, are admissible to show who was in possession of the property. *Doane et al.* v. *Glenn et al.*, 495.

27. AS TO WHO WAS IN CHARGE OF PROPERTY ADMISSIBLE. The officer having testified that the claimants were with the property at the time the levy was made, his testimony upon that point was admissible, and a motion to exclude all of his testimony from the jury, was properly overruled. *Doane et al.* v. *Glenn et al.*, 496.

28. PRACTICE — WHEN FORMAL OBJECTIONS TO DEPOSITION MUST BE MADE. Formal objections to a deposition must be made before trial, and the objection that the official character of a notary public, by whom the deposition was taken, is not authenticated, is of this nature. Id.

29. DEPOSITION — WITNESS MUST BE SWORN IN THE CAUSE. A deposition taken in an attachment suit, upon notice that a deposition would be read upon the trial of the cause, and the witness being sworn to testify in that cause, is not admissible upon the trial of an issue between interpleading claimants of the property attached and the plaintiffs in the attachment. Id.

30. PRESUMPTION OF OWNERSHIP ARISING FROM POSSESSION OF PERSONAL PROPERTY. Upon issue joined between interpleading claimants and plaintiffs in attachment, where there is evidence to show that the claimants were in possession of the property at the time the writ was levied, the jury was properly instructed that, if the property was found in possession of the

claimants at the time of the levy, from such possession the law raises a presumption that the claimants were then the owners of such property. Id.

31. OF OWNERSHIP OF PROPERTY ATTACHED — SHERIFF'S RETURN. Where the sheriff returns to a writ of attachment that the defendants are not found in his county, and does not state in whose possession he found the property attached, such return does not make out a *prima facie* case of ownership of the property in the attachment defendants. Id.

32. OF CONFESSION — WHETHER SUFFICIENT TO ESTABLISH GUILT. Upon indictment for administering drugs to a woman pregnant with child, with intent to produce miscarriage, confessions of the prisoner to the effect that he gave certain drugs to the woman named in the indictment, and that the effect of such drugs was to make the woman sick, may be sufficient to establish guilt, there being other evidence to prove the fact of pregnancy, and it appearing that about the time of the alleged offense the prisoner inquired of a physician, and of other persons, to ascertain what kind of drugs would produce miscarriage. *Dougherty* v. *The People*, 515.

33. OF AGENT'S AUTHORITY TO BIND HIS PRINCIPAL. In an action against a mining company for money borrowed by its agent without authority, where evidence is offered of admissions made by the president of the company, such president may be examined as to his authority to bind the company in relation to the matter in suit. *Union Gold Mining Co.* v. *R. M. Nat. Bank*, 532.

34. AGENT — RATIFICATION OF UNAUTHORIZED ACT OF. Where an agency exists, and the agent exceed his authority, the silence of the principal may give rise to a presumption of an intentional ratification of the unauthorized act. The circumstances must have been fully understood by the principal before any inference can be drawn from his silence, and they must have been such as not only afforded an opportunity to act or speak, but such, also, as would properly and naturally call for some action or reply from men similarly situated.

In an action against a corporation to recover money borrowed by its agent without authority, it appeared that the company was notified of the indebtedness on the 16th December, 1868. Fifteen days later, the president undertook to present the claim to the board of directors at a meeting to be held in February following, and the corporation disavowed the act of its agent in the spring following. *Held*, that upon these facts, the jury would have been warranted in finding a ratification of the agent's acts. Id.

35. OF RATIFICATION OF AGENT'S ACTS. In an action against a mining company to recover money borrowed by its agent without authority, the circumstance that the company retained the ore taken from the mine by the use of the money is not material to the question of ratification.

Nor is it competent to show that the money was expended in the mine or that the expenditure was advantageous to the company, unless it is also shown that the company had knowledge of the loan and of the expenditure. These circumstances are in no way connected with the authority of the agent, or the ratification of his acts by the company. Id.

36. AS TO WITNESS' BIAS OR PREJUDICE. A witness cannot be asked whether he is indebted to one of the parties to the suit for the purpose of showing the disposition of his mind toward such party. The question does not tend to elucidate the point.

AS TO CORRUPT AGREEMENT BETWEEN WITNESS AND PARTY. Where it is alleged that a witness refused to testify until the party who called him had made an arrangement concerning certain indebtedness, the character and terms of the arrangement must be made known in order that the court may determine whether it would go to his credibility. Id.

37. CONTRACT, EXPRESS — ABANDONED WITHOUT CAUSE. Where a special contract was entered into, by which the plaintiff agreed to serve the defendant for the term of one year, if the plaintiff voluntarily and without the fault of the defendant quit the service of the defendant, she cannot recover.

THE SPECIAL CONTRACT BEING SHOWN, it ought to appear that there was sufficient cause for abandoning it. *Cody* v. *Raynaud*, 272.

38. RELEASE OF DEFENDANT BY ACCEPTING THIRD PARTY. In an action for the price and value of goods, the defendant alleged that he purchased the goods as agent for B., and it appeared that some time after the purchase was made plaintiffs rendered an account to B., in which he was charged with the balance of defendant's bill, for which action was brought. There being no evidence to show that plaintiffs agreed to accept B. as their debtor, or

that B. agreed to pay the debt, the defendant was not thereby discharged. *Tiger* v. *Lincoln et al.*, 395.

39. ACTS AND DECLARATIONS OF PLAINTIFF NOT ADMISSIBLE IN HIS FAVOR. An instruction to the jury that a demand may be inferred from the actions, conduct and conversation of the parties is erroneous. *Roach* v. *Binder*, 322.

40. DECLARATIONS OF AGENT. In an action against a mining company to recover for services rendered, a declaration by an agent of the company that the plaintiff should lose nothing by the company, and a declaration by a director of the company to the same effect, are to be regarded as admissions of the company. *Consolidated Gregory Company* v. *Raber*, 512.

41. NOT PERTINENT TO THE ISSUE. If evidence not pertinent to the issue is given to the jury, the court may upon motion withdraw it. *Christian* v. *Tucker*, 49.

42. A FACT IN ISSUE SHALL NOT BE REGARDED AS ADMITTED BY PREVIOUS PLEADING. Where any particular fact is affirmed on the one side and denied on the other, no previous admission in the pleadings can be taken as evidence of the existence or non-existence of that fact. *Paul* v. *Luttrel*, 317.

43. AGENT'S AUTHORITY — MAY BE ATTACKED BY CREDITOR OF THE PRINCIPAL. A creditor of the principal may attack a sale made by an agent, upon the ground that the agent was without authority to make it, but a mere stranger cannot be allowed to interfere between principal and agent.

THE CREDITOR MUST PROVE A DEBT and legal process against the principal in the same manner as one who seeks to avoid a sale under the statute of frauds and for the same reason. *Berry* v. *Hart et al.*, 246.

44. REFUSAL OF CITY OFFICER TO ISSUE LICENSE. In an action to recover a penalty for selling intoxicating liquor without license the defendant cannot show that the city clerk improperly refused to issue a license to him. *Deitz* v. *City of Central*, 324.

45. REPLEVIN IN DETINET — DEMAND AND REFUSAL. In replevin against one who has acquired the property replevied in good faith, it is necessary to prove a demand before suit brought or something equivalent to it. *Roach* v. *Binder*, 322.

46. TROVER — DEMAND AND REFUSAL. In the action of trover, proof of demand and refusal is made for the purpose of showing a conversion of the property by defendant, and when the plaintiff is able to show such fact by other evidence, he need not resort to such proof. *Turner* v. *Hahn*, 23.

FORCIBLE ENTRY AND DETAINER:

1. In an action for forcible entry on lands the plaintiff must show that he was in actual possession of the lands at the time of the alleged entry. *Wier* v. *Bradford*, 14.

2. UNLAWFUL DETAINER — DEMAND FOR POSSESSION. In an action of unlawful detainer under section 5, chapter 35, Revised Statutes, 333, the plaintiff must aver and prove a demand in writing for possession of the premises which he seeks to recover. *Doss* v. *Craig*, 177.

3. UNLAWFUL DETAINER BEFORE JUSTICE OF THE PEACE — QUESTION OF TITLE. In an action of unlawful detainer against a tenant holding over, brought before a justice of the peace, the effect of raising the question of title is to remove the cause to another court, and not to defeat it altogether. *Kopfer* v. *Keller*, 410.

4. PLEADING AND PROOF — IN UNLAWFUL DETAINER. The rule which requires that the proof shall support the allegation is as applicable to the action of unlawful detainer as to any other.

EVIDENCE — TO DISPROVE PLAINTIFF'S CASE. In an action of unlawful detainer against a tenant holding over, for the purpose of disproving the tenancy, the defendant may show that he entered as a purchaser and not as a tenant, and this whether the agreement to purchase was good or bad. Id.

FORMER RECOVERY:

See EVIDENCE, 13.

HOMICIDE:

See CRIMINAL LAW, 1, 2, 3, 4.

See INDICTMENT, 6, 9.

INDICTMENT:

1. SURPLUSAGE. An indictment for assault, with intent to murder, in which the word "*feloniously*" is unnecessarily used, is good. *Gile* v. *The People*, 60.

2. MISDEMEANOR — CONVICTION MAY BE HAD UPON AN INDICTMENT FOR FELONY. A conviction for misdemeanor may be had upon an indictment for felony in case where the misdemeanor is included in the higher offense. *Foster* v. *The People*, 293.

3. INDICTMENT FOR MAYHEM NEED NOT NEGATIVE CIRCUMSTANCES MENTIONED IN PROVISO TO SECTION 43. An indictment for mayhem, in which the fact and the intent are charged, is good for the principal crime, mentioned in section 43, and also for the misdemeanor mentioned in the last clause of that section. Id.

4. INDICTMENT FOR SECRETING OR EMBEZZLING LETTERS — DESCRIPTION OF LETTERS. In an indictment against a mail carrier, for secreting or embezzling letters deposited in the mail, and intrusted to him to be carried, it is not necessary to describe the letters by stating to whom they were addressed, and by whom they were written. *Farnum* v. *U. S.*, 309.

5. INDICTMENT UNDER SECTION 12, ACT OF 1864 — WHAT IT MUST CONTAIN. In order to convict under the last clause of that section, it must be alleged in the indictment that the letter, packet, bag or mail of letters contained an article of value. Id.

6. INDICTMENT FOR DELIBERATE AND PREMEDITATED HOMICIDE. An indictment for murder in the common-law form is sufficient to support a conviction for deliberate or premeditated killing under the act of 1870. (8 Sess. 70.) The words "malice aforethought" in the indictment are co-extensive in meaning with the words "deliberate and premeditated," and a charge that a homicide was committed with malice aforethought, comprehends a case of deliberate and premeditated killing. *Hill* v. *The People*, 436.

7. INDICTMENT FOR CRIMINAL ABORTION — DESCRIPTION OF DRUG. In such case it is not necessary to set out in the indictment the kind of drug or liquid administered. *Dougherty* v. *The People*, 514.

8. CAPTION MAY BE AMENDED. *Farnum* v. *U. S.*, 309.

9. JURISDICTION — AVERMENT AS TO, IN INDICTMENT FOR MURDER UNDER ACT OF CONGRESS. An indictment based upon section 3 of the act of Congress of 1790, in which it is alleged that the murder was committed "at the said county of Gilpin" without further description of the place, and without any averment as to the jurisdiction of the United States, is not sufficient. *Franklin* v. *U. S.*, 35.

INSTRUCTIONS TO THE JURY:

1. INSTRUCTIONS SHOULD BE WRITTEN. Instructions to the jury should be written, and the court should not orally qualify or modify them. *Dorsett* v. *Crew*, 18; *Gile* v. *The People*, 60.

2. INSTRUCTIONS — NOT APPLICABLE TO THE EVIDENCE. Instructions, which cannot be applied to the evidence, should not be given to the jury. *Christian* v. *Tucker*, 49; *Allen* v. *Eldridge*, 288.

3. INSTRUCTIONS — AS TO FACTS. Instructions to the jury should be confined to the law of the case, leaving the facts to be determined by the jury. *Sopris* v. *Truax*, 89; *Kinney* v. *Williams*, 191.

4. INSTRUCTION ERRONEOUS AS TO THE HIGHER OFFENSE, BUT NOT AS TO THE LESSER. Upon indictment for mayhem the jury were instructed that, if the injury was inflicted during a fight between the prisoner and the prosecuting witness by consent, and the prisoner was the assailant, or the prosecuting witness had declined further combat at the time the fact occurred, the prisoner was guilty. This charge, if applied to the higher offense, is erroneous, but, if applied to the inferior offense, it is too favorable to the prisoner. *Foster* v. *The People*, 293.

5. EVIDENCE — ACTS AND DECLARATIONS OF PLAINTIFF NOT ADMISSIBLE IN HIS FAVOR. An instruction to the jury that a demand may be inferred from the actions, conduct and conversation of the parties is erroneous. *Roach* v. *Binder*, 322.

6. INSTRUCTION AS TO PRESUMPTION OF INTENT. It is the duty of the court to draw the attention of the jury to the points in the case and to pre-

sumptions of fact, which the law authorizes them to deduce from the evidence. *Hill* v. *The People*, 436.

And in the present case, it was the duty of the court to lay before the jury the presumption of fact respecting the intention of the accused, and it was the duty of the jury to yield to its force and conclusiveness. Id.

The jury should, however, be told that the presumption is to be drawn by them, and does not arise by implication of law. Id.

An instruction, by which the jury were probably led to believe that they were relieved from considering the intention of the accused as a fact arising in the case, is erroneous. Id.

This rule is not applicable to the ordinary inference of malice, which arises upon proof of killing, but to cases of deliberate and premeditated homicide, under the act of 1870. Id.

7. PRACTICE—CHANGING FORM OF INSTRUCTION. The refusal to give a proper instruction cannot be assigned for error, when the court gives other instructions embracing the correct principle embraced in the instruction asked. *Dougherty* v. *The People*, 515.

IRRIGATION OF LANDS:

1. EASEMENT—RIGHT TO CONVEY WATER OVER LAND FOR IRRIGATION. In this territory lands are held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands. *Yunker* v. *Nichols*, 551.

2. MAY EXIST WITHOUT GRANT OR PRESCRIPTION. A right to convey water over the land of another for the purpose of irrigating one's land may be acquired under the statute (Rev. Stat. 363), and such right needs not a grant from the owner of the servient estate to support it. Id.

JUDGMENT:

1. JUDGMENT—DEFECTIVE IN FORM. There may be error in the form or substance of a judgment, as well as in the proceedings preliminary to it. *Hoehne* v. *Trugillo*, 161.

2. JUDGMENT—WHEN DEFENDANT MAY BE IMPRISONED. Where the charter provides that if the defendant has no property whereof the judgment can be collected, the defendant may be committed to jail, it is error to enter judgment that the defendant stand committed until the fine and costs are paid. In such case execution should be awarded, and if no property can be found the defendant may be committed to jail. *Deitz* v. *City of Central*, 324.

3. JUDGMENT UPON DEMURRER—SUFFICIENCY. Where two demurrers to the declaration were on file, and the judgment of the court refers to the said demurrer, without specifying which of them, it will be presumed that the court passed upon both of them.

A judgment upon demurrer that the same be overruled, although informal, will be sustained. *Watson* v. *Hahn*, 385 and 386.

4. JUDGMENT IN ACTION OF DEBT—FORM. In an action of debt, a judgment in the form used in actions of assumpsit is erroneous. *Anderson et al.* v. *Sloan*, 485.

5. JUDGMENT ON ISSUE FOUND FOR INTERPLEADING CLAIMANTS. It is irregular to enter judgment in favor of interpleading claimants for the possession of the property attached, but where all the property attached is embraced in the claimant's pleading, the irregularity is not sufficient to reverse judgment. *Doane et al.* v. *Glenn et al.*, 496.

6. EVIDENCE—BY PAROL OF CONTENTS OF RECORD. Parol evidence is not admissible to prove the amount of a judgment or the cause of action upon which it was recovered. The record or a transcript therefrom must be produced. *Watson* v. *Hahn*, 385.

7. JUDGMENT NIL DICIT. If defendants, after appearance, fail to plead or demur, judgment *nil dicit* should be rendered against them before other proceedings are had in the case. *Wilcox et al.* v. *Field et al.*, 3.

8. JUDGMENT EXCEEDING AD DAMNUM. Judgment should not be rendered for a greater amount than is claimed in the declaration. Id.

9. JUDGMENT UPON PLEA IN ABATEMENT. Under the act of 1861 (1 Sess. 204) as amended by the act of 1864 (3 Sess. 43), if issue of fact joined upon such plea be found for the plaintiff, the judgment is *quod recuperet*. *Worrall* v. *Hare*, 92.

10. PRACTICE — JUDGMENT NIL DICIT CANNOT BE TAKEN ON RETURN DAY. Judgment *nil dicit* cannot be entered on the return day of the summons, even if the defendant appear on that day and move to continue the cause. *Hoehne* v. *Rupear*, 405.

JUDICIAL SALES:

1. SALE OF ATTACHED PROPERTY — EFFECT OF, UPON CONTEMPORANEOUS LIENS. Where several attachment suits were commenced to different terms of court, and all the writs were levied upon the same property, and all the suits were pending at the same time, and the property was sold under judgments obtained in the suits first commenced: *Held*, that all the creditors were entitled to share in the proceeds of the sale, and the liens of the several attachments upon the attached property were divested by the sale. *Maloney* v. *Grimes*, 112.

2. SALE OF PROPERTY UPON REDEMPTION BY JUDGMENT CREDITOR DOES NOT INURE TO THE BENEFIT OF OTHER CREDITORS. An attaching creditor, having obtained judgment redeemed from a sale made under a judgment obtained in another attachment suit, and caused the premises to be re-sold pursuant to sections 14 and 15, chapter 48, Revised Statutes: *Held*, that other creditors. who had commenced suit by attachment to the same term with the redeeming creditor, were not entitled to share in the proceeds of such re-sale. Id.

3. ATTACHMENTS — DISTRIBUTING PROCEEDS OF ATTACHED property among creditors. The twenty-sixth section of the attachment act provides for *pro rata* distribution of the proceeds of attached property among creditors who have sued out writs returnable, and returned to the same term of court. Id.

JURISDICTION:

1. SERVICE OF PROCESS. It is error to enter judgment against parties who have not been served with process. *Dorsett* v. *Crew*, 18; *Langley et al.* v. *Grill et al.*, 71.

2. AVERMENT AS TO, IN INDICTMENT FOR MURDER UNDER ACT OF CONGRESS. An indictment based upon section 3 of the act of Congress of 1790, in which it is alleged that the murder was committed "at the said county of Gilpin" without further description of the place, and without any averment as to the jurisdiction of the United States, is not sufficient. *Franklin* v. *U. S.*, 35.

3. JURISDICTION OF DISTRICT AND PROBATE COURTS. In civil cases, where the debt or sum claimed does not exceed $2,000, district and probate courts are of concurrent jurisdiction. *Cass* v. *Davis*, 43; *Loveland* v. *Sears*, 194; *Cody* v. *Reynaud*, 272.

4. JURISDICTION OF PROBATE COURTS IN EQUITY. Probate courts were deprived of equity jurisdiction by the act of February 8, 1865 (4 Sess. 97), and a decree rendered after that date, in a cause which was pending at the time the repealing act was passed, was reversed. *Remington et al.* v. *Smith*, 53.

5. JURISDICTION OF PROBATE COURT TO TRY APPEALS. One who appeals from the judgment of a justice of the peace to a probate court, and goes to trial in the latter court without objection, cannot question its appellate jurisdiction. *Kurtee* v. *McCord*, 164.

6. CERTIORARI will not lie from a district to a probate court. *Loveland* v. *Sears*, 194.

7. JURISDICTION OF PROBATE COURT — PLAINTIFF MAY REMIT EXCESS OVER $2,000, AND SUE IN THAT COURT. If the plaintiff's demand exceed $2,000, he may remit the excess and sue for that sum in the probate court. *Litchfield* v. *Daniels*, 268.

8. JURISDICTION OF PROBATE COURT IN FOREIGN COUNTY. Section 2, chapter 70, Revised Statutes, 500, applies to actions brought in probate courts. *Cody* v. *Reynaud*, 272; *Phelps* v. *Spruance*, 414.

9. JURISDICTION OF JUSTICE OF THE PEACE UNDER ORDINANCES OF CITY. Notwithstanding the attempt of the legislative assembly to confer a wrong name upon him, the justice of the peace has jurisdiction of cases arising under the ordinances of the city. *Detts* v. *City of Central*, 323.

10. JURISDICTION — MANDAMUS TO DISTRICT JUDGE. This court has jurisdiction of an application to compel a judge of a district court to recognize a district attorney. *The People* v. *Hallett*, 352.

11. TRESPASS — JUSTIFICATION UNDER PROCESS OF INFERIOR COURT. Whoever justifies or asserts any right under the sentence or judgment of a court of inferior jurisdiction ought to be required to show the substantial regularity of its proceedings at every step. *Nachtrieb* v. *Stoner*, 424.

12. JURISDICTION — UPON A SPECIAL CASE OR STATEMENT OF FACTS. In such case the court acquires jurisdiction of the parties and of the subject-matter, by force of the agreement, and if nothing is expressed as to the judgment or decree to be rendered upon the facts stated, the court is not empowered to do any thing whatever in the premises. *Central City Water Co.* v. *Kimber et al.*, 475.

13. JURISDICTION OF SUPREME COURT IN CRIMINAL CASES. This court can entertain jurisdiction of causes only in the methods prescribed by law, and cannot give judgment in a criminal cause certified into this court from a district court, without writ of error. *The People* v. *Myers*, 508.

14. PLEADING IN ACTION WHERE DEFENDANT RESIDES IN FOREIGN COUNTY. It is not necessary to aver in the declaration the facts which will give the court jurisdiction over a defendant who resides in another county. *Cody* v. *Raynaud*, 272.

15. JURISDICTION — WANT OF — MUST BE PLEADED IN ABATEMENT. If the court has not jurisdiction of the person, the defendant must plead that fact in abatement, and she cannot raise the question by motion. Id.

JUROR:

ALIENAGE OF. A verdict will not be set aside on account of the alienage of one of the jurors to whom no objection was made at the trial. *Turner* v. *Hahn*, 24.

JUSTICE OF THE PEACE:

1. ON APPEAL from judgment of, bond may be amended. *Gardner* v. *Dunn*, 1; *School District* v. *Erskin*, 367.

2. LEGISLATIVE POWER — TO CHANGE THE OFFICIAL TITLE OF A JUSTICE OF THE PEACE. The legislative assembly has no power to confer upon a justice of the peace a denomination not warranted by the organic act, and, in so far as the charter of the City of Central confers upon the justice of the peace exercising jurisdiction under the ordinances thereof, the name of police magistrate, it is void. *Deitz* v. *City of Central*, 323.

3. JURISDICTION OF JUSTICE OF THE PEACE UNDER ORDINANCES OF CITY. But, notwithstanding the attempt of the legislative assembly to confer a wrong name upon him, the justice of the peace has jurisdiction of cases arising under the ordinances of the city. Id.

4. TRESPASS — JUSTIFICATION UNDER PROCESS OF INFERIOR COURT. Whoever justifies or asserts any right under the sentence or judgment of a court of inferior jurisdiction ought to be required to show the substantial regularity of its proceedings at every step. *Nachtrieb* v. *Stoner*, 424.

5. INTEREST OF MAGISTRATE IN RESULT OF SUIT — WHAT WILL DISQUALIFY. Where a citizen of a municipality is elected a justice of the peace, according to the charter, that he is, in virtue of his citizenship, entitled to share in the penalties adjudged against the accused, is no objection to his competency. In such case the provisions of the charter amount to an express declaration that interest shall not disqualify. *Deitz* v. *City of Central*, 323.

6. PRACTICE — TRIAL OF APPEALS FROM JUSTICE OF THE PEACE. Upon appeal to the district court from the judgment of a justice of the peace, the trial should be *de novo*, and the district court has no power to review the proceedings of the justice of the peace. *Lee* v. *Ralston*, 5.

7. WAIVER OF OBJECTIONS — ON APPEAL FROM JUSTICE OF THE PEACE. Section 46, chapter 50 of the Revised Statutes, 407, relating to proceedings in district court on appeal from justice of the peace, is applicable to cases arising under the ordinances of the City of Central.

Objection that summons was returnable on the day it was issued, cannot be made in the district court.

Nor that the justice of the peace assumed a title not warranted by law.

Nor that the plaintiff's demand was not indorsed on the summons. *Deitz* v. *City of Central*, 323.

KANSAS TERRITORY:

LAW OF, NOT IN FORCE HERE. A lien upon the premises benefited cannot be asserted under the mechanics' lien law of the late territory of Kansas. *Townsend et al.* v. *Wild et al.*, 10.

LICENSE:

1. LICENSE ISSUED BY CITY NO DEFENSE TO PROSECUTION UNDER GENERAL LAW. In an indictment, under the act of 1861, concerning licenses, for selling spirituous liquors without license within the limits of the city of Black Hawk, a license issued under the charter and ordinances of that city cannot be shown in defense. *Paton* v. *The People*, 77.

2. REFUSAL OF CITY CLERK TO ISSUE LICENSE. In an action to recover a penalty for selling intoxicating liquor without license, the defendant cannot show that the city clerk improperly refused to issue a license to him. *Delta* v. *City of Central*, 324.

3. STATUTE INOPERATIVE. The thirteenth section of the act of 1861 (1 Sess. 71), concerning licenses, was never effectual for any purpose. *Paton* v. *The People*, 77.

4. MILITARY RESERVATION — LAWS OF TERRITORY OPERATE WITHIN. An indictment and conviction under chapter 53, Revised Statutes, for selling spirituous liquor without license, at and within the military reservation of Fort Lyon, is good. *Reynolds* v. *The People*, 179.

MANDAMUS:

See JURISDICTION, 10.

MARRIED WOMAN:

1. MAY RECOVER HER EARNINGS. By chapter 60, Revised Statutes, 454, a husband is deprived of all interest in the labor of his wife, rendered to third persons, and a married woman may maintain an action in her own name to recover her earnings. *Allen* v. *Eldridge*, 287.

2. MAY DEFEND ACTIONS. A married woman is under no disability in respect to the time or manner of making her defense to an action brought against her. *Mills et ux.* v. *Angela*, 334.

3. POWER TO CONTRACT. By the act of 1861, to protect the rights of married women (1 Sess. 152), a wife may make contracts respecting her separate business and estate; beyond these limits her contracts are governed by the common law and are therefore void. She cannot warrant her husband's title to realty, or covenant for his act or default in any respect whatever. *Holladay* v. *Dailey*, 460.

4. POWER OF ATTORNEY TO CONVEY HUSBAND'S LANDS EXECUTED BY WIFE. Therefore, where husband and wife joined in a power of attorney, the attorney could do no act under the power which should in any way charge the wife's estate or bind her or those in privity with her. Id.

MECHANIC'S LIEN:

1. PRIOR TO NOVEMBER 4, 1861. A party who furnished materials toward the erection of a building prior to November 4, 1861, cannot have a lien for the value thereof upon the premises benefited. *Townsend et al.* v. *Wild et al.*, 10.

2. EFFECT OF REPEAL OF MECHANIC'S LIEN LAW. Liens existing under the act of 1864 fell when that act was repealed, unless within the saving clause of the 28th section of the act of 1867. *Woodbury et al.* v. *Grimes et al.*, 100.

3. PRACTICE IN CASES OF MECHANIC'S LIEN. In cases arising under the act relating to mechanic's liens (Rev. Stat., ch. 54, 427) the chancery practice is to be observed. *Clear Creek Mining Co.* v. *Root*, 374.

4. INTEREST ON DEMAND SECURED BY LIEN. A debtor may agree to pay interest on a demand secured by mechanic's lien as well as upon any other, and whatever its effect among creditors, the debtor cannot object to pay the interest. Id.

5. ANSWERS INSUFFICIENT. The answers in this case are insufficient to support the decree in not showing, 1st. The time when the contracts were made; 2d. The kind of labor performed; 3d. The quantity of materials furnished; and they contain no prayer for relief. *Ford Gold Mining Co.* v. *Langford*, 62.

6. TIME TO REDEEM — DISCRETIONARY. Where the court has allowed ninety days before sale in which the premises may be redeemed, the decree will not be disturbed on that account. *Clear Creek Mining Co.* v. *Root*, 374.

MISNOMER:

1. AS TO MIDDLE NAME. The law knows but one christian name, and the omission or incorrect insertion of a middle name or initial letter is immaterial. *Doane et al.* v. *Glenn et al.*, 496.

2. JUNIOR OR JR. If the word "junior" or "jr." is omitted from the plaintiff's name in the record of a judgment, the omission is not material. *Loveland* v. *Sears*, 433.

MORTGAGE:

1. NOT ASSIGNABLE AT LAW. The assignee of a mortgage has no remedy upon it at law, except it be treated as an absolute conveyance, and the mortgagee convey the premises by deed. *Longan* v. *Carpenter*, 205.

2. ASSIGNABLE IN EQUITY. But if a promissory note secured by mortgage is assigned, the assignee will hold the mortgage subject to the equities existing between the mortgagor and mortgagee at the date of the assignment. Id.

3. ASSIGNED — RIGHTS OF PARTIES. At law the innocent holder of a negotiable note may recover the amount thereof; but if the note is secured by mortgage, and the holder seeks to foreclose the mortgage, the mortgagor can avail himself of any payments made to the mortgagee before the assignment. Id.

4. A PROMISSORY NOTE SECURED BY MORTGAGE and by pledge of personal property was assigned before maturity to a *bona fide* purchaser. Previous to the assignment a portion of the pledged property was sold by the payee, but no credit was indorsed on the note. In a suit by the assignee to foreclose the mortgage, *held*, that the mortgagor was entitled to be credited with the amount realized by the payee from the sales of the pledged property. Id.

5. DESCRIPTION OF INDEBTEDNESS. A mortgage given to secure all past indebtedness due and owing from the mortgagor to the mortgagee contains a sufficient description of the indebtedness. *Machette* v. *Wanless*, 225.

6. CHATTEL MORTGAGE MUST BE EXECUTED ACCORDING TO STATUTE. A chattel mortgage, which does not provide that the property shall remain in the possession of the mortgagor, and which is not executed according to the statute (Rev. Stat., chap. 14, 102), cannot be received in evidence. Id.

7. CONSTRUCTION OF MORTGAGE MUST BE SUCH AS WILL GIVE EFFECT TO THE WHOLE INSTRUMENT. A mortgage in terms defeasible upon payment of a note for $100, but which, by another clause, appears to have been intended as a security for past indebtedness, will be construed so as to bring the clause relating to past indebtedness within the terms of the defeasance. *Machette* v. *Wanless*, 225.

NATIONAL BANKS:

See CORPORATIONS, 3, 4, 5.

See CONTRACTS, 6.

See STATUTES, CONSTRUCTION OF, 20.

NEW TRIAL:

1. VERDICT ACCORDING TO EVIDENCE. The verdict of the jury in this case was according to the evidence, and a new trial was denied. *Turner* v. *Hahn*, 24.

2. JUROR — ALIENAGE OF. A verdict will not be set aside on account of the alienage of one of the jurors, to whom no objection was made at the trial. Id.

3. WHERE EVIDENCE IS CONFLICTING. Where evidence is conflicting, and there is evidence upon which the verdict may stand, a new trial will not be granted, although another verdict might well have been given. *Smith et al.* v. *Cisson*, 29; *Murphy* v. *Cunningham*, 467; *Matthews et al.* v. *Glines et al.*, 472.

4. JUROR — COMPETENCY OF. A juror having expressed himself strongly against the accused before trial, the fact was brought to the attention of the court upon motion for a new trial. *Held*, that a new trial should have been allowed. *Fitzgerald* v. *The People*, 56.

5. VERDICT SUPPORTED BY EVIDENCE. Where the prisoner went to the house of deceased with R. and after some words with deceased the prisoner knocked him down, and thereupon R. put a rope around deceased's neck and strangled him to death, and the prisoner and R. carried deceased's body some distance from the house where the homicide was committed and threw it into a mining shaft, a new trial will not be granted on the ground that the evidence is not sufficient to support a verdict. *Smith* v. *The People*, 121.

6. NEWLY-DISCOVERED EVIDENCE. A new trial will not be granted to enable the prisoner to obtain evidence which does not tend to excuse or mitigate the crime. Id.

7. WHERE THE VERDICT IS NOT SUPPORTED BY EVIDENCE. In an action of replevin for two mules, a wagon and harness, there was no evidence as to the wagon and harness. A general verdict for the plaintiff will be set aside, and a new trial awarded. *Carothers* v. *Jones*, 196.

8. EVIDENCE INSUFFICIENT IN REPLEVIN. In replevin in the *cepit* and issue joined upon plea of *non detinet*, if there is no proof of the taking or of demand and refusal, or of equivalent circumstances to show detention, the evidence is not sufficient to support a verdict for the plaintiff, and a new trial should be awarded. *Paul* v. *Luttrell*, 317.

9. SUFFICIENCY OF EVIDENCE TO SUPPORT FINDING. In determining the relative credit to be given to the testimony of conflicting witnesses, so much consideration is due to the manner and bearing of each under examination, and their apparent intelligence and candor, or prejudice, that a court of review, to which all these things are hidden, ought not lightly to reject the opinion of either court or jury, before whom the witnesses for both parties have been subjected to examination and cross-examination. *Tiger* v. *Lincoln et al.*, 394.

10. Where a witness for the plaintiff testified that the defendant purchased goods of the plaintiff, and the defendant denied that he had made such purchase, and the court found the issue for the plaintiff, such finding will not be set aside for insufficient testimony. Id.

11. Where, however, the finding is unsupported as to a portion of the damages assessed, the judgment will be reversed and the cause remanded, with direction to the court below to enter judgment for the proper sum. Id.

12. DAMAGE IN TRESPASS DE BONIS. Where it appears that the defendant procured an inferior court to issue an attachment in a case not warranted by law, and to give judgment upon constructive service for a fictitious demand, and sell property of plaintiff of the value of $300, a verdict of $750 damages is not excessive. *Nachtrieb* v. *Stoner*, 423.

13. VERDICT NOT SUPPORTED BY EVIDENCE. If, in an action of replevin, no evidence of the value of the property, or of the value of its use, is given, no more than nominal damages can be allowed for the detention thereof. *Sopris* v. *Webster*, 507.

14. EVIDENCE TO SUPPORT VERDICT. In an action against a mining company by an employee, to recover for services rendered, a declaration by an agent of the company that the plaintiff should lose nothing by the company, and another declaration by a director of the company to the same effect, are to be regarded as admissions of the company, and are sufficient to support the verdict. *Consolidated Gregory Co.* v. *Raber*, 512.

15. PRESUMPTION IN SUPPORT OF JUDGMENT OF COURT BELOW. In an action against two defendants named Smith, the record did not disclose whether the parties were sued as copartners or otherwise. At the trial the defendants put in an account in which they used the name of "Smith Bro.," and a receipt in which they were styled "P. Smith & *Co.*" Upon this evidence it will be presumed that the defendants were sued as copartners. *Smith et al.* v. *Cisson*, 29.

NOTICE:

1. NOTICE BY PUBLICATION — WHAT IS SUFFICIENT. Where the statute requires that notice of the pendency of an attachment suit shall be published in a newspaper for four weeks, it is not sufficient to publish such notice for twenty days. *Crary* v. *Barber*, 172.

2. PRACTICE — AMENDING RECORD AFTER JUDGMENT — UPON WHOM TO SERVE NOTICE. Where an order allowing a bill of exceptions to be filed in vacation was omitted from the record, notice of an application to amend

the record in that particular may be served upon the attorneys who appeared for the opposing party at the trial of the cause. *Doane et al.* v. *Glenn et al.*, 454.

3. JUDICIAL NOTICE — LAWS OF KANSAS TERRITORY. If the laws of the late territory of Kansas, relating to the descent of real estate, were at any time in force in this territory, they are to be judicially noticed, and need not be proved at the trial. *Crandall* v. *Sterling Gold Mining Co.*, 106.

OFFICERS:

1. INTEREST OF MAGISTRATE IN RESULT OF SUIT — WHAT WILL DISQUALIFY. Where a citizen of a municipality is elected a justice of the peace, according to the charter, that he is, in virtue of his citizenship, entitled to share in the penalties adjudged against the accused, is no objection to his competency. In such case the provisions of the charter amount to an express declaration that interest shall not disqualify. *Deitz* v. *City of Central*, 323.

2. EVIDENCE — OFFICIAL CHARACTER OF SHERIFF. Whatever rule may be enforced against an officer justifying under process, it seems to be sufficient for third persons to show that he is an officer *de facto*, and a plaintiff in attachment who is sued in trespass is not bound to show that the sheriff who levied the writ was an officer *de jure*. It is sufficient for him to show that the sheriff was performing the duties of the office and generally recognized in it. *Berry* v. *Hart et al.*, 246.

See DISTRICT ATTORNEY.

As to officer *de facto*, see EVIDENCE, 17.

PARTIES:

1. SURVIVOR — MAY SUE ALONE UPON JOINT DEMAND. The right of a survivor to sue without joining with the representative of his deceased co-obligee is not limited to cases of partnership. *Smith* v. *Salomon*, 176.

2. PRACTICE IN SUIT AGAINST REPRESENTATIVES OF DECEASED PARTY TO DECREE. Error may be brought against the executrix and sole devisee of a deceased party to a decree, without preliminary proof of the death of such party or of the appointment of the person sued. *Wise et al.* v. *Brocker*, 550.

3. ACTION — CAUSES THAT MAY BE JOINED. Demands due to a plaintiff in his own right and as survivor of another, may be joined. *Smith* v. *Salomon*, 176.

4. NONJOINDER OF DEFENDANTS MUST BE PLEADED IN ABATEMENT. Nonjoinder of defendants is never a bar, but only matter in abatement. *Tiger* v. *Lincoln et al.*, 395.

5. MARRIED WOMAN — MAY RECOVER HER EARNINGS. By chapter 60, Revised Statutes, 454, a husband is deprived of all interest in the labor of his wife, rendered to third persons, and a married woman may maintain an action in her own name to recover her earnings. *Allen* v. *Eldridge*, 287.

PARTNERS:

1. COPARTNERS ARE BOUND BY THE ACT OF ONE. A contract by one of several copartners, in relation to the partnership business, is binding upon the firm. *Smith et al.* v. *Cisson*, 29.

PLEADING AT LAW:

1. IN REPLEVIN — FRAUD. The rule which requires that fraud be specially pleaded does not apply to the action of replevin. *Sopris* v. *Truax*, 89.

2. MUST BE IN THE ENGLISH LANGUAGE. Pleadings in probate courts must be in the English language. *Dunlon* v. *Montoyo*, 99.

3. DEMURRER TOO LARGE. Whether a demurrer is general or special, if it go to the whole declaration and there be one good count, it must be overruled. *Smith* v. *Salomon*, 176.

4. WANT OF CONSIDERATION. In an action upon a promissory note, want of consideration must be specially pleaded. *Patterson* v. *Gile*, 200.

5. IN TRESPASS — JUSTIFICATION BY OFFICER. In trespass *de bonis* against an officer, if he justify under a writ of attachment, he must aver return of the writ.

SAME — JUSTIFICATION BY PLAINTIFF IN ATTACHMENT. But this rule is not applicable to the plaintiff in the attachment suit. *Berry* v. *Hart et al.*, 246.

6. JUSTIFICATION BY PLAINTIFF IN ATTACHMENT. If a plaintiff in attachment is sued in trespass by a stranger to the proceeding he need not aver the ground upon which the attachment was issued. Id.

7. DECLARATION ON REPLEVIN BOND. In actions on penal bonds in which, under the statute, the plaintiff assigns several breaches of the conditions of the bond in a single count of the declaration, the several assignments in connection with the body of the count are regarded as constituting separate and distinct counts of the declaration. *Sopris* v. *Lilly et al.*, 396.

8. PLEA TO WHOLE DECLARATION — MUST ANSWER ALL ALLEGATIONS THEREIN. In an action upon a penal bond, a plea which goes to the whole declaration must be sufficient as to all breaches of the conditions of the bond which are well assigned therein. Id.

9. In an action on a replevin bond it was alleged that the principal in the bond failed to prosecute the replevin suit with effect and to return the property replevied according to the conditions of the bond. The defendants pleaded that the property was in fact returned, and the costs of the replevin suit paid. The plea was bad, for the reason that it did not answer the breach assigned upon failure to prosecute the replevin suit. Id.

10. IN ACTION WHERE DEFENDANT RESIDES IN FOREIGN COUNTY. It is not necessary to aver in the declaration the facts which will give the court jurisdiction over a defendant who resides in another county. *Cody* v. *Raymond*, 272.

11. JURISDICTION — WANT OF — MUST BE PLEADED IN ABATEMENT. If the court has not jurisdiction of the person, the defendant must plead that fact in abatement, and she cannot raise the question by motion. Id.

12. MUST BE GOOD AS TO ALL. If two or more in pleading join in a defense which is sufficient for one but not for others, the plea is bad as to all.

The sheriff who levied the writ of attachment joined with the attaching creditor in a plea of justification insufficient as to the latter, and the defense was not available to either of them. *Deitsch* v. *Wiggins et al.*, 299.

13. PLEA DEFECTIVE — ISSUE THEREON. A plea defective in substance is not cured by joining issue thereon unless the defects are supplied in the replication. Id.

14. PLEA OF JUSTIFICATION MUST BE SPECIAL. In trespass *de bonis* the defense that the goods were taken under attachment against a third person is not admissible under the general issue. Id.

15. IN REPLEVIN — DETENTION OF PROPERTY MAY BE PUT IN ISSUE. The detention of the goods is a material fact, necessary in either form of action to maintain the plaintiff's case, and may always be put in issue either by the plea of *non detinet*, or, perhaps by the plea of *non cepit*, where the plaintiff declares in the *cepit* or by special plea. *Paul* v. *Lawrence*, 317.

16. A FACT IN ISSUE SHALL NOT BE REGARDED AS ADMITTED BY PREVIOUS PLEADING. Where any particular fact is affirmed on the one side and denied on the other, no previous admission in the pleadings can be taken as evidence of the existence or non-existence of that fact. Id.

17. IN REPLEVIN — NON DETINET IS GOOD. Therefore if, to a declaration in the writ the defendant plead *non detinet*, this shall not be regarded as an admission of the taking alleged in the declaration in such sense as to relieve the plaintiff from making proof of the detention. Id.

18. PRACTICE IN ACTION TO RECOVER PENALTY UNDER CITY ORDINANCES. Where the charter of a city provides that to recover a penalty, fine or forfeiture prescribed by ordinance, it shall be sufficient to declare generally, in debt, it is not necessary to file a written declaration in the common-law form. *Swift* v. *City of Central*, 324.

19. VARIANCE MAY BE ALLEGED UNDER NON EST FACTUM. In debt on a promissory note, the defendant may take advantage of a misdescription of the note under the plea of *non est factum*. *Peddie* v. *Donnelly*, 421.

20. CONTEMPORANEOUS AGREEMENT AS DEFENSE TO A NOTE. In an action on a promissory note, if the defendant sets up a contemporaneous agreement modifying the note, he must allege in his plea that the agreement was in writing. *Peddie* v. *Donnelly*, 421.

21. AFFIDAVIT DENYING EXECUTION OF INSTRUMENT SUED ON. An affidavit accompanying a plea of *non est factum* must follow the plea so far as to deny the execution of the instrument sued on.

Where it is alleged in a declaration on an appeal bond, that defendants executed the bond by the name and style of T. G. Anderson, Edwin Scudder and A. C. Hunt, an affidavit in which it is averred that the defendants did not make their said supposed writing obligatory, signed Thomas G. Anderson, Edwin Scudder and A. C. Hunt, is not sufficient to deny the execution of the instrument. *Anderson et al.* v. *Sloan*, 484.

22. NIL DEBET IN DEBT ON A SPECIALTY. In an action on an appeal bond the plea of *nil debet* is bad. Id.

23. IN DEBT ON APPEAL BOND. In an action on an appeal bond by an administrator of the obligee, a plea interposed by a surety in the bond, to the effect that if the plaintiff, as administrator, etc., has been damnified, it is because of the wrong and default of his intestate, is bad. Id.

24. DENYING EXECUTION OF INSTRUMENT MUST BE VERIFIED. If a plea denying the execution of the instrument sued on is put in without oath, the execution of the instrument need not be proved. Id. *Thackaray* v. *Hanson*, 365.

25. MUST ANSWER ALL THAT IT PROFESSES TO MEET. A plea which goes to the whole declaration, and contains an answer to but one count, is bad on demurrer. *Union Gold Mining Co.* v. *Rocky Mountain Nat. Bk.*, 531.

26. ONE GOOD COUNT in the declaration will support a general verdict. *Loveland* v. *Sears*, 433.

27. PERFORMANCE OF CONDITION PRECEDENT. In an action upon contract to pay two sums of money, the first when a certain suit is defeated, the second when the title to certain property is perfected, it is necessary to aver and prove the performance of these conditions, or to excuse the failure.

BUT A CONDITION IMPOSSIBLE to be performed need not be noticed, and if, at the date of the contract, no suit was pending, as set forth in the contract, the payee could not be required to show that he had defeated such suit, and he may recover the sum payable upon such condition, upon a count for an account stated. *Armor* v. *Fisk*, 148.

28. DENYING PARTNERSHIP. Under section 6, chapter 30, Revised Statutes, 310, a plaintiff is not required to prove the joint liability of defendants sued as partners, unless the execution of the instrument sued on is denied by plea verified by affidavit.

IMMATERIAL ISSUE — PLEA DENYING PARTNERSHIP. Where in a suit on a promissory note against several defendants as partners, one of them pleaded that at the date of the execution of the note he was not the partner of his co-defendants, the plaintiff was not required to prove the partnership. *Litchfield* v. *Daniels*, 268.

PLEADING AND EVIDENCE:

1. CONTRACT MUST BE PROVED AS LAID. Where money was to be paid upon the sale of certain mining property, the plaintiff must show that the property has been sold before he can recover. *Cheney* v. *Barber*, 73.

2. PERFORMANCE OF CONDITION PRECEDENT. In an action upon contract to pay two sums of money, the first when a certain suit is defeated, the second when the title to certain property is perfected, it is necessary to aver and prove performance of these conditions, or to excuse the failure. *Armor* v. *Fisk*, 148.

3. BUT A CONDITION IMPOSSIBLE to be performed need not be noticed, and if, at the date of the contract, no suit was pending as set forth in the contract, the payee could not be required to show that he had defeated such suit, and he may recover the sum payable upon such condition upon a count for an account stated. Id.

4. JUSTIFICATION IN TRESPASS. If a plaintiff in attachment, who is sued in trespass, set out in his plea the ground upon which the attachment issued, it is not necessary to support the averment at the trial. *Berry* v. *Hart et al.*, 246.

5. CONDITION PRECEDENT — PERFORMANCE MUST BE PROVED. In order to recover upon an agreement to pay $600 when W. S. R. should sell certain mining property on the Bobtail lode, the plaintiff must prove that W. S. R. sold property on that lode, and also that the property so sold was that which was referred to in the agreement. *Cheney* v. *Barber*, 256.

6. JUSTIFICATION BY PLAINTIFF IN ATTACHMENT. If a plaintiff in attachment is sued in trespass by a stranger to the proceeding he need not aver the ground upon which the attachment was issued. Id.

7. DECLARATION ON REPLEVIN BOND. In actions on penal bonds in which, under the statute, the plaintiff assigns several breaches of the conditions of the bond in a single count of the declaration, the several assignments in connection with the body of the count are regarded as constituting separate and distinct counts of the declaration. *Sopris* v. *Lilly et al.*, 266.

8. PLEA TO WHOLE DECLARATION — MUST ANSWER ALL ALLEGATIONS THEREIN. In an action upon a penal bond, a plea which goes to the whole declaration must be sufficient as to all breaches of the conditions of the bond which are well assigned therein. Id.

9. In an action on a replevin bond it was alleged that the principal in the bond failed to prosecute the replevin suit with effect and to return the property replevied according to the conditions of the bond. The defendants pleaded that the property was in fact returned, and the costs of the replevin suit paid. The plea was bad, for the reason that it did not answer the breach assigned upon failure to prosecute the replevin suit. Id.

10. IN ACTION WHERE DEFENDANT RESIDES IN FOREIGN COUNTY. It is not necessary to aver in the declaration the facts which will give the court jurisdiction over a defendant who resides in another county. *Cody* v. *Raynaud*, 272.

11. JURISDICTION — WANT OF — MUST BE PLEADED IN ABATEMENT. If the court has not jurisdiction of the person, the defendant must plead that fact in abatement, and she cannot raise the question by motion. Id.

12. MUST BE GOOD AS TO ALL. If two or more in pleading join in a defense which is sufficient for one but not for others, the plea is bad as to all.

The sheriff who levied the writ of attachment joined with the attaching creditor in a plea of justification insufficient as to the latter, and the defense was not available to either of them. *Dettach* v. *Wiggins et al.*, 299.

13. PLEA DEFECTIVE — ISSUE THEREON. A plea defective in substance is not cured by joining issue thereon unless the defects are supplied in the replication. Id.

14. PLEA OF JUSTIFICATION MUST BE SPECIAL. In trespass *de bonis* the defense that the goods were taken under attachment against a third person is not admissible under the general issue. Id.

15. IN REPLEVIN — DETENTION OF PROPERTY MAY BE PUT IN ISSUE. The detention of the goods is a material fact, necessary in either form of action to maintain the plaintiff's case, and may always be put in issue, either by the plea of *non detinet*, or, perhaps by the plea of *non cepit*, where the plaintiff declares in the *cepit* or by special plea. *Paul* v. *Luttrell*, 317.

16. A FACT IN ISSUE SHALL NOT BE REGARDED AS ADMITTED BY PREVIOUS PLEADING. Where any particular fact is affirmed on the one side and denied on the other, no previous admission in the pleadings can be taken as evidence of the existence or non-existence of that fact. Id.

17. IN REPLEVIN — NON DETINET IS GOOD. Therefore if, to a declaration in the *cepit*, the defendant plead *non detinet*, this shall not be regarded as an admission of the taking alleged in the declaration in such sense as to relieve the plaintiff from making proof of the detention. Id.

18. PRACTICE IN ACTION TO RECOVER PENALTY UNDER CITY ORDINANCES. Where the charter of a city provides that to recover a penalty, fine or forfeiture, prescribed by ordinance, it shall be sufficient to declare generally, in debt, it is not necessary to file a written declaration in the common-law form. *Delle* v. *City of Central*, 324.

19. VARIANCE MAY BE ALLEGED UNDER NON EST FACTUM. In debt on a promissory note, the defendant may take advantage of a misdescription of the note under the plea of *non est factum*. *Peddle* v. *Donnelly*, 421.

20. CONTEMPORANEOUS AGREEMENT AS DEFENSE TO A NOTE. In an action on a promissory note, if the defendant sets up a contemporaneous agreement modifying the note, he must allege in his plea that the agreement was in writing. *Peddle* v. *Donnelly*, 421.

21. AFFIDAVIT DENYING EXECUTION OF INSTRUMENT SUED ON. An affidavit accompanying a plea of *non est factum* must follow the plea so far as to deny the execution of the instrument sued on.

Where it is alleged in a declaration on an appeal bond, that defendants executed the bond by the name and style of T. G. Anderson, Edwin Scudder and A. C. Hunt, an affidavit in which it is averred that the defendants did not make their said supposed writing obligatory, signed Thomas G. Anderson, Edwin Scudder and A. C. Hunt, is not sufficient to deny the execution of the instrument. *Anderson et al.* v. *Sloan*, 484.

22. NIL DEBET IN DEBT ON A SPECIALTY. In an action on an appeal bond the plea of *nil debet* is bad. Id.

23. IN DEBT ON APPEAL BOND. In an action on an appeal bond by an administrator of the obligee, a plea interposed by a surety in the bond, to the effect that if the plaintiff, as administrator, etc., has been damnified, it is because of the wrong and default of his intestate, is bad. Id.

24. DENYING EXECUTION OF INSTRUMENT MUST BE VERIFIED. If a plea denying the execution of the instrument sued on is put in without oath, the execution of the instrument need not be proved. Id. *Thackaray* v. *Hanson*, 365.

25. MUST ANSWER ALL THAT IT PROFESSES TO MEET. A plea which goes to the whole declaration, and contains an answer to but one count, is bad on demurrer. *Union Gold Mining Co.* v. *Rocky Mountain Nat. Bk.*, 531.

26. ONE GOOD COUNT in the declaration will support a general verdict. *Loveland* v. *Sears*, 433.

27. PERFORMANCE OF CONDITION PRECEDENT. In an action upon contract to pay two sums of money, the first when a certain suit is defeated, the second when the title to certain property is perfected, it is necessary to aver and prove the performance of these conditions, or to excuse the failure.

BUT A CONDITION IMPOSSIBLE to be performed need not be noticed, and if, at the date of the contract, no suit was pending, as set forth in the contract, the payee could not be required to show that he had defeated such suit, and he may recover the sum payable upon such condition, upon a count for an account stated. *Armor* v. *Fisk*, 148.

28. DENYING PARTNERSHIP. Under section 6, chapter 30, Revised Statutes, 310, a plaintiff is not required to prove the joint liability of defendants sued as partners, unless the execution of the instrument sued on is denied by plea verified by affidavit.

IMMATERIAL ISSUE — PLEA DENYING PARTNERSHIP. Where in a suit on a promissory note against several defendants as partners, one of them pleaded that at the date of the execution of the note he was not the partner of his co-defendants, the plaintiff was not required to prove the partnership. *Litchfield* v. *Daniels*, 268.

PLEADING AND EVIDENCE:

1. CONTRACT MUST BE PROVED AS LAID. Where money was to be paid upon the sale of certain mining property, the plaintiff must show that the property has been sold before he can recover. *Cheney* v. *Barber*, 73.

2. PERFORMANCE OF CONDITION PRECEDENT. In an action upon contract to pay two sums of money, the first when a certain suit is defeated, the second when the title to certain property is perfected, it is necessary to aver and prove performance of these conditions, or to excuse the failure. *Armor* v. *Fisk*, 148.

3. BUT A CONDITION IMPOSSIBLE to be performed need not be noticed, and if, at the date of the contract, no suit was pending as set forth in the contract, the payee could not be required to show that he had defeated such suit, and he may recover the sum payable upon such condition upon a count for an account stated. Id.

4. JUSTIFICATION IN TRESPASS. If a plaintiff in attachment, who is sued in trespass, set out in his plea the ground upon which the attachment issued, it is not necessary to support the averment at the trial. *Berry* v. *Hart et al.*, 246.

5. CONDITION PRECEDENT — PERFORMANCE MUST BE PROVED. In order to recover upon an agreement to pay $600 when W. S. R. should sell certain mining property on the Bobtail lode, the plaintiff must prove that W. S. R. sold property on that lode, and also that the property so sold was that which was referred to in the agreement. *Cheney* v. *Barber*, 256.

6. MUST SUPPORT THE ALLEGATION. In an action of trespass *quare clausum*, if the *locus in quo* be described in the declaration, the evidence must be confined to the place named. *Sullivan et al.* v. *Clements*, 261.

7. DENYING PARTNERSHIP. Under section 6, chapter 30, Revised Statutes, 310, a plaintiff is not required to prove the joint liability of defendants sued as partners, unless the execution of the instrument sued on is denied by plea verified by affidavit. *Litchfield* v. *Daniels*, 268.

8. IMMATERIAL ISSUE—PLEA DENYING PARTNERSHIP. Where in a suit on a promissory note against several defendants as partners, one of them pleaded that at the date of the execution of the note he was not the partner of his co-defendants, the plaintiff was not required to prove the partnership. Id.

9. TRESPASS—PLEA OF JUSTIFICATION. In trespass *de bonis* against an attaching creditor who justifies under the writ he must aver and prove a debt due from the attachment defendant to him. *Deitsch* v. *Wiggins et al.*, 299.

10. PLEA DEFECTIVE IN SUBSTANCE. A plea substantially defective presents no defense to the action, and evidence of the facts alleged therein, or of those omitted therefrom, cannot be received although issue is joined thereon. Id.

11. EVIDENCE OF DETENTION IN REPLEVIN—WHAT SHALL BE. Upon such issue the plaintiff may maintain the affirmative by proof of the taking, or by proof of demand and refusal before action brought, or by proof of other circumstances warranting the inference that a demand would have been unavailing. Upon such issue the defendant may maintain the negative by showing that before suit brought he restored the goods to the plaintiff's possession, or that the goods were, before action brought, destroyed by the act of God, or possibly by his own act. *Paul* v. *Luttrell*, 317.

12. PLEADING AND PROOF—AS TO TIME In an action to recover a penalty for selling intoxicating liquor without license, evidence may be introduced of sales made anterior to the earliest day named in the complaint. *Deitz* v. *City of Central*, 324.

13. EVIDENCE OF REFUSAL OF CITY OFFICER TO ISSUE LICENSE. In such action the defendant cannot show that the city clerk improperly refused to issue a license to him. Id.

14. VARIANCE IN DESCRIPTION OF PROMISSORY NOTE. A promissory note expressed to be given for cash borrowed may be described in the declaration as given for value received. *Thackaray* v. *Hanson*, 365.

15. IN UNLAWFUL DETAINER. The rule which requires that the proof shall support the allegation is as applicable to the action of unlawful detainer as to any other. *Klopfer* v. *Keller*, 410.

16. VARIANCE IN DESCRIPTION OF NOTE. In an action against two it was alleged that the defendants made their note, "the said Abram D. Bevan by the name and style of A. D. Bevan," and the note was signed by A. D. Bevan and his co-defendant. *Held*, that there was no variance, and there was no ground of demurrer to the declaration. *Peddle* v. *Donnelly*, 421.

17. COMMON COUNTS. In an action by the second indorsee of a promissory note against the first indorser, the plaintiff may recover upon evidence of an express promise under the common counts. *Watson* v. *Hahn*, 494.

18. CRIMINAL ABORTION. If the drug administered is described in the indictment, it is not necessary that the proof should correspond with the allegation. *Dougherty* v. *The People*, 514.

19. UNLAWFUL DETAINER—DEMAND FOR POSSESSION. In an action for unlawful detainer under section 5, chapter 35, Revised Statutes, 333, the plaintiff must aver and prove a demand in writing for possession of the premises which he seeks to recover. *Doss* v. *Craig*, 177.

PLEADING IN CHANCERY:

1. ANSWER SETTING UP MECHANICS' LIEN. The answers in this case are insufficient to support the decree in not showing, 1st. The time when the contracts were made; 2d. The kind of labor performed; 3d. The quantity of materials furnished; and they contain no prayer for relief. *Ford Gold Mining Co.* v. *Langford et al.*, 62.

2. ANSWER WITHOUT OATH. It may be doubtful whether complainants can deprive defendants of the benefit of their oaths in this proceeding.

But if the oath is waived and the answer is put in without oath, there is no ground for complaint. Id.

3. BILL IN CHANCERY — MULTIFARIOUS. Several plaintiffs cannot demand by one bill several matters perfectly distinct and unconnected against one defendant, nor can one plaintiff demand several matters of different nature against several defendants. *City of Denver* v. *Kent et al.*, 337.

4. A BILL TO SET ASIDE AND CANCEL SEVERAL CONVEYANCES alleged to have been fraudulently made to different parties at several times by the trustee of the town-site of Denver, is multifarious and cannot be maintained. Id.

5. FAILURE TO OBSERVE SECTION 4 OF ACT OF ASSEMBLY. Where a bill was filed against one who had obtained title, under the act of congress and of the territorial assembly, to a lot in the city of Denver, by one who claimed title to the same lot which accrued in the year 1859, to have the defendant declared a trustee for the benefit of the complainant, and it was not averred that the complainant or his grantors had filed a declaratory statement, as required by the fourth section of the act of the assembly, the relief was denied. *Cofield* v. *McClellan*, 370.

6. SPECIFIC PERFORMANCE — PRAYER FOR RELIEF. In a suit for specific performance of a contract of sale the vendor of land may recover possession of the land sold under the prayer for general relief. *Gilpin* v. *Watts*, 479.

POWER OF ATTORNEY:

See PRINCIPAL AND AGENT, 6.

PRACTICE AT LAW:

1. JUDGMENT NIL DICIT. If defendants, after appearance, fail to plead or demur, judgment *nil dicit* should be rendered against them before other proceedings are had in the case. *Wilcox et al.* v. *Field et al.*, 3.

2. JUDGMENT EXCEEDING AD DAMNUM. Judgment should not be rendered for a greater amount than is claimed in the declaration. *Wilcox et al.* v. *Field et al.*, 3.

3. TRIAL OF APPEALS FROM JUSTICE OF THE PEACE. Upon appeal to the district court from the judgment of a justice of the peace, the trial should be *de novo*, and the district court has no power to review the proceedings of the justice of the peace. *Lee* v. *Ralston*, 5.

4. DEFAULT CANNOT BE TAKEN WHILE DEMURRER IS PENDING. It is error to enter a judgment by default against a defendant who has a demurrer on file which has not been disposed of. *Gibson* v. *Smith*, 7.

5. JUDGMENT UPON DEMURRER NOT FINAL. A judgment sustaining a demurrer is not final. *Andrews* v. *Loveland et al.*, 8.

6. UPON OVERRULING A DEMURRER. Upon overruling a demurrer to a declaration, if the defendant does not plead further, judgment of *nil dicit* should be entered, and a jury should be impanelled to assess damages. In such case it is error to swear the jury to try the issue joined. *McNasser* v. *Sherry*, 12.

7. DEMURRER SHOULD BE HEARD. A demurrer to a complaint for forcible entry and detainer should be heard and determined. *Wier* v. *Bradford*, 14.

8. MOTION TO DISMISS SHOULD BE HEARD. So, also, a motion to dismiss, filed by leave of the court, should be heard and determined. Id.

9. CONSTRUCTION OF A RULE OF COURT. A rule of court, which requires that affidavits in support of a motion shall be served by copy upon the opposite party twenty-four hours before the hearing, does not comprehend affidavits read at the hearing on behalf of the party who resists the motion. *Turner* v. *Hahn*, 24.

10. EVIDENCE AS TO IDENTITY OF PARTIES IS FOR THE JURY. Whether witnesses who use the surnames of parties to the suit refer to the parties, or to some other persons of the same name, is a question for the jury. If there is a doubt as to the identity of a person named by a witness, it is easily solved upon cross-examination, and if the party, in whose favor the doubt will operate, fails to apply the test, there is strong ground for believing that he does not desire to dissipate the doubt. *Smith et al.* v. *Cisson*, 29.

11. AFFIDAVITS IRREGULARLY MADE. Affidavits sworn to before the attorney of the party making them should not be received. *Anderson* v. *Sloan*, 33.

12. EVIDENCE — NOT PERTINENT TO THE ISSUE. If evidence not pertinent to the issue is given to the jury, the court may upon motion withdraw it. *Christian* v. *Tucker*, 49.

13. APPEARANCE CURES DEFECTIVE SUMMONS. Defendants who appear and move a continuance of the cause waive defects in the summons. *Jones et al.* v. *Stevens*, 67.

14. DAMAGES MUST BE ASSESSED BY JURY IN CERTAIN CASES. In an action of trespass to recover damages for diverting water from an irrigating ditch, if the defendants are defaulted, the damages must be assessed by a jury. Id.; *Gallup et al.* v. *Wilder et al.*, 293.

15. MOTION TO RESTORE COMPETENCY OF WITNESS. A motion for leave to file a new bond, in order to obtain the testimony of a surety in the original bond, should be based upon affidavit showing the materiality of the testimony which is to be obtained. *Sopris* v. *Truax*, 89.

16. JUDGMENT UPON PLEA IN ABATEMENT. If an issue of fact joined upon plea in abatement in an attachment suit be found for the plaintiff, the judgment is *quod recuperet*. *Worrall* v. *Hare*, 92.

17. TRIAL — BEFORE THE COURT. If neither party demand a jury, a probate court may try an issue of fact without a jury. *Kurtz* v. *McCord*, 164.

18. BURDEN OF PROOF — AS TO WHEN NOTE WAS INDORSED. *Prima facie* one whose name is upon the back of a note is to be regarded as an indorser, and if the plaintiff would charge him as maker, the burden of proof is upon him to show that the party to be charged signed his name at the time the note was made, as surety for the maker and for his accommodation, or that the indorser participated in the consideration. Where there was no express agreement between the parties, and the indorser did not participate in the consideration, and it does not appear that he wrote his name on the back of the note before it came to the hands of the payee, the evidence is not sufficient to sustain the verdict. *Good* v. *Martin*, 165.

19. PLEADINGS NOT TO BE GIVEN TO THE JURY. It is not good practice to allow the jury to take the declaration to their room when they retire to consider of their verdict. Id.

20. SERVICE OF PROCESS MUST BE SHOWN BY THE RECORD. The record must show that the defendant was duly notified of the proceedings against him, or that he appeared in the district court. *Crary* v. *Barber*, 172.

21. APPEARANCE FOR THE PURPOSE OF OBJECTING TO THE SERVICE OF PROCESS. If a defendant file written objections to the manner of serving process, and limit his appearance to the purpose of the motion, this is not a general appearance in the cause. Id.

22. APPEARANCE — WHAT AMOUNTS TO. An order of court which sets out that the parties came by their attorneys, and on plaintiff's motion leave was granted to amend the sheriff's return and the declaration, and the cause was continued, does not show a general appearance in the cause by the defendant. Id.

23. UNLAWFUL DETAINER. In an action of unlawful detainer if the plaintiff fail to aver and prove a demand in writing for the possession of the premises the omission is not cured by plea of title in defendant nor by verdict. *Doss* v. *Craig*, 177.

24. DAMAGES — EXEMPLARY — TO BE DETERMINED BY THE JURY. Whether exemplary damages shall be awarded in an action of trespass is a question for the jury. *Kinney* v. *Williams*, 191.

25. JUDGMENT WHEN DECLARATION NOT ON FILE. The court cannot proceed to judgment in an action at law without a declaration on file in the cause. *Haskins* v. *Tucker et al.*, 263; *Gallup et al.* v. *Wilder et al.*, 264.

26. AS TO BILL OF PARTICULARS. If the declaration contain a special count on a promissory note, and the common counts, and the plaintiff stipulate that he will at the trial rely upon the promissory note only, it is not necessary to file a bill of particulars. *Ford et al.* v. *Brown et al.*, 265.

27. AS TO FILING COPY OF INSTRUMENT SUED ON. If a copy of the instrument on which the action is founded is filed with the declaration, and the declaration is amended, it is not necessary to file another copy with such amendment. Id.

28. PLAINTIFF'S DEMAND DETERMINED BY AD DAMNUM. If the plaintiff limit the *ad damnum* in his declaration to $2,000, this shall operate to remit the excess over that sum to the defendant. *Litchfield* v. *Daniels*, 268.

29. WAIVER OF OBJECTIONS — ON APPEAL FROM JUSTICE OF THE PEACE. Section 46, chapter 50 of the Revised Statutes, 407, relating to proceedings in district court on appeal from justice of the peace, is applicable to cases arising under the ordinances of the city of Central. Objection that summons was returnable on the day it was issued, cannot be made in district court. Nor that the justice of the peace assumed a title not warranted by law. Nor that the plaintiff's demand was not indorsed on the summons. *Deitz* v. *City of Central*, 323.

30. EVIDENCE OF PAROL ASSIGNMENT IN ACTION BY ONE TO USE OF OTHERS. In an action upon a promissory note, brought by one for the use of others, it is not necessary at the trial to prove a parol assignment of the note to the persons to whose use the suit is prosecuted. *Cody* v. *Butterfield*, 378.

31. WITHDRAWING DEMURRER — WHAT SHALL BE REGARDED AS. If, upon overruling demurrer to declaration, an order is made at the instance of the plaintiff requiring the defendant to plead, athough the defendant fail to object, he shall not be regarded as withdrawing his demurrer and submitting to the rule. *Watson* v. *Hahn*, 385.

32. COMMON-LAW FORMS — SHOULD BE OBSERVED. The common-law forms of entries cannot be abandoned without danger to the rights of parties and it is much to be regretted that clerks are not more familiar with them. *Watson* v. *Hahn*, 386.

33. WAIVER — OF JOINDER IN DEMURRER. If a party proceed to argue a demurrer without joining in demurrer, he cannot complain of the omission. Id.

34. JUDGMENT NIL DICIT CANNOT BE TAKEN ON RETURN DAY. Judgment *nil dicit* cannot be entered on the return day of the summons, even if the defendant appear on that day and move to continue the cause. *Hoehne* v. *Rupear*, 405.

35. MOTION TO SUPPRESS DEPOSITION TOO BROAD. A motion to suppress a deposition founded upon objections to answers to cross-interrogatories should be denied. *Good et al.* v. *Martin*, 406.

36. DEFENDANT'S RIGHT TO PLEAD DE NOVO AFTER AMENDMENT. In the absence of any showing as to the necessity for making a new defense after amendment, the granting or refusing leave to plead anew was in the discretion of the court, of which appellants cannot complain in this court. *Good et al.* v. *Martin*, 407.

37. APPEARANCE — EFFECT OF WITHDRAWAL UPON ISSUE. If a defendant who has joined issue in a cause, with leave of the court, withdraw his appearance, the issue on his part falls to the ground, and judgment of default should be entered against him. Id.

38. DEFAULT MUST PRECEDE FINAL JUDGMENT. It is irregular to proceed to final judgment against defendants served with process, without entering judgment of default. Id.

39. AMENDED BILL OF PARTICULARS. If the plaintiff file a bill of particulars with his declaration, and the defendant make no objection to such bill, and the plaintiff afterward, and within ten days of the second term, file a more specific bill of particulars, the defendant cannot obtain a continuance at the second term, because of the filing of such amended bill. *Phelps* v. *Spruance*, 414.

40. PLEADING — ONE GOOD COUNT WILL SUPPORT GENERAL VERDICT. It cannot be objected that one count in a declaration is faulty, if there is one good count to support the finding. Rev. Stat. 509. *Loveland* v. *Sears*, 433.

41. REFERRING NOTE TO CLERK TO COMPUTE AMOUNT DUE. Where a judge of probate court acts as his own clerk, it is not necessary to refer a note on which action is brought to the clerk to compute the amount due thereon. Id.

42. MISNOMER — OMISSION OF WORD "JUNIOR" IN RECORD OF JUDGMENT. The word "junior" is no part of a name, and where a plaintiff in the summons and declaration affixed the letters "jr." to his name, the omission of those letters in the record of judgment is immaterial. Id.

43. WHAT MUST BE EXPRESSED IN A SPECIAL CASE. Where parties waive process and pleading, and come before the court upon an agreed case, the nature of the relief sought must be expressed in the agreement. *Central City Water Co.* v. *Kimber et al.*, 475.

44. WAIVER OF ISSUE OF FACT BY GOING TO TRIAL. In such case the defendant cannot object that there was no issue of fact. If he appear at the trial, and proceed as upon issue joined, he must abide the result. *Anderson et al.* v. *Sloan*, 485.

45. WAIVER OF DEMURRER BY GOING TO TRIAL. If, after filing a demurrer to the declaration, a defendant proceeds to trial on the merits, he thereby waives his demurrer, and cannot object in this court that the issue thereon remains undetermined. Id.

46. PROCEEDINGS WHEN JUDGMENT IS REVERSED AND CAUSE IS REMANDED. When the judgment of a district court is reversed in this court, and the cause is remanded for a new trial, the jurisdiction of the district court is restored, and the parties are bound to attend and proceed to trial whenever required by that court.

In such case it is not essential that the plaintiff should proceed at the first term after the judgment is reversed.

Nor that he should file the precept or mandate of this court before proceeding in the district court.

Nor that he should give notice to his adversary of his intention to docket the cause in the district court. *Paul* v. *Luttrell*, 491.

47. APPEARANCE — EFFECT OF WITHDRAWING. If a defendant enter an appearance in a cause, in which he has not been served with process, and afterward withdraw his appearance, "without prejudice to the plaintiffs," the plaintiffs are in the same position as if such appearance had not been withdrawn or in any manner qualified.

The appearance, to all intents and purposes, still stood as a waiver of process and sufficiently supported the judgment *nil dicit* which was afterward given. *Creighton* v. *Kerr et al.*, 509.

48. APPEARANCE — EFFECT OF IN PROCEEDING IN REM. If, in a suit in attachment, in which service of process has not been made, the defendant enter his appearance, the character of the proceeding is changed from an action *in rem* to an action *in personam*. Id.

49. PRACTICE IN CASES OF CRIMINAL ABORTION — WHAT IS FOR THE CONSIDERATION OF THE JURY. Upon indictment, under section 42, Criminal Code (Rev. Stat. 202), for administering a noxious or destructive substance or liquid to a woman pregnant with child, with intent to produce miscarriage, whether the substance or liquid is noxious or destructive is a question of fact for the jury. *Dougherty* v. *The People*, 514.

50. RATIFICATION OF UNAUTHORIZED ACT OF AGENT — HOW DETERMINED. Where the position of the parties remains the same, whether ratification of the unauthorized act of an agent shall be inferred from the delay of the principal to disavow such act, is a question for the jury. *Union Gold Mining Co.* v. *R. M. Nat. Bk.*, 533.

51. APPEAL FROM JUSTICE OF THE PEACE. On appeal from justice of the peace, the bond may be amended. *Gardner* v. *Dunn*, 1; *School District* v. *Erskin*, 307.

52. ATTACHMENT, APPEARANCE IN. If a defendant appear in attachment suit without personal service of process, the plaintiffs are not limited to the amount or causes of action specified in the affidavit. *Creighton* v. *Kerr et al.*, 509.

53. INTENTION IN HOMICIDE, HOW ASCERTAINED. Under the act of 1870, the intention of the accused at the time of the killing is to be ascertained by the jury upon the evidence. *Hill* v. *The People*, 436.

54. COSTS — NOT ALLOWED WHEN AMOUNT DUE HAS BEEN TENDERED BEFORE SUIT. Where the jury find that, before suit brought, the amount found to be due the plaintiff was tendered to him, he cannot recover costs. *Leis* v. *Hodgson*, 393.

55. COSTS DISCRETIONARY. On appeal from justice of the peace the power to apportion costs is to be exercised in the discretion of the district court. *Murphy* v. *Cunningham*, 467.

56. FORMAL OBJECTIONS TO DEPOSITIONS must be made before trial. *Doane et al.* v. *Glenn et al.*, 496.

57. JUDGMENT FOR INTERPLEADING CLAIMANTS should not be for possession of the property attached, but for the possession of the property described in the plea. Id.

58. MISNOMER. The omission or incorrect insertion of a middle name or initial letter is immaterial. Id.

59. TRIAL TO COURT. Where an issue of fact is submitted to the judge at *nisi prius* he performs the functions of both court and jury, and the same presumption must be indulged to sustain his finding as would be made in favor of the verdict of a jury. *Murphy* v. *Cunningham*, 467.

PRACTICE IN CRIMINAL CASES:

See PRACTICE AT LAW, 49, 53.

See PRACTICE IN SUPREME COURT, 20, 21, 37.

See CRIMINAL LAW, 3, 4, 5, 7.

See INDICTMENT, 2, 8.

See PLEADING AND EVIDENCE, 12.

PRACTICE IN CHANCERY:

1. DECREE — WHAT IS FINAL. An order overruling a demurrer to a bill in chancery is not a final decree in the cause. *Armor* v. *Lyon et al.*, 7.

2. BILL TO ENFORCE VENDOR'S LIEN — DECREE. A contract for the sale of land was made, but the land was not conveyed. Upon bill filed by the vendor to enforce a lien for the purchase-money, it was error to decree a sale of the land. *Todd et al.* v. *Simonton*, 54.

3. The proper practice in such case is to require the vendee to pay the money due upon the contract within a specified time, or in default thereof that he be foreclosed of all equity of redemption in the premises. Id.

4. PRACTICE IN LIEN CASES. Under the Mechanics' Lien Act of 1864 (3d Sess. 102), all creditors interested in the premises to be charged may have their claims adjusted in one suit. *Ford Gold Min. Co.* v. *Langford et al.*, 62.

5. THE BETTER PRACTICE for creditors, who seek to establish a lien in a pending suit, is to file a bill in the nature of a cross-bill setting forth the facts respecting the lien in the same way as if the bill were original, and making the debtor and all other parties to the suit defendants therein. Id.

6. In whatever way creditors, who are defendants in the bill, are allowed to assert their demands, they must observe the same strictness in pleading that is required of the party who institutes the suit. Id.

7. IF A DEFENDANT CREDITOR sets up a lien in his answer, an opportunity should be afforded the debtor and all other parties to the suit to resist his demand. Id.

8. IF THE DEBTOR and the other parties fail to answer his allegations within the time fixed by the court, there should be an order taking the answer as confessed, and the subsequent proceedings should be the same as upon a bill. Id.

9. Although the sufficiency of the bill was not questioned, the decree was wholly reversed, in order that the district court might have full control of the cause. Id.

10. DEMURRER TO BILL IN CHANCERY — DOES NOT REACH DEFECTS NOT APPARENT IN THE BILL. In a bill against husband and wife to foreclose a mortgage, it was averred that the defendants made, executed, acknowledged and delivered the mortgage to complainant. No copy of the mortgage was attached to the bill. Objections to the sufficiency of the certificate of acknowledgment appended to the mortgage were not raised by demurrer to the bill. *Mills et ux.* v. *Angela*, 334.

11. BILL TO FORECLOSE NEED NOT BE PUT IN UNDER OATH. A bill to foreclose a mortgage need not be put in under oath. The signature of counsel is a sufficient authentication. Id.

12. EVIDENCE TO SUPPORT BILL CONFESSED. Upon bill confessed, the court may proceed to a decree, with or without evidence, to support the bill, and this rule is applicable to lien cases. *Clear Creek Mining Co.* v. *Root*, 374.

13. PLEADING AND PROOF — DECREE MUST NOT EXCEED DEMAND IN BILL. A decree cannot be entered for more than is claimed in the bill. Id.

14. TIME TO REDEEM — DISCRETIONARY. Where the court has allowed ninety days before sale in which the premises may be redeemed, the decree will not be disturbed on that account. Id.

15. HOW POSSESSION MAY BE RECOVERED. The vendor may recover possession of land in a suit to enforce specific performance of contract. *Gilpin* v. *Watts*, 479.

16. IN CASES OF MECHANIC'S LIEN. In cases arising under the act relating to mechanic's liens (Rev. Stat., ch. 54, 427) the chancery practice is to be observed. *Clear Creek Mining Co.* v. *Root*, 374.

PRACTICE IN SUPREME COURT:

1. EXCEPTION TO RULING OF COURT. Error cannot be assigned upon the ruling of the court in giving an instruction to the jury, unless an exception to such ruling was entered at the time it was made. *Smith et al.* v. *Cisson*, 29; *Kurtz* v. *Simonton*, 70; *Smith* v. *The People*, 121.

2. JOINDER IN ERROR. A defendant failed to join in error as required by rule of court, and the judgment was for that reason reversed. *Murdock* v. *Townsend*, 33.

3. BILL OF EXCEPTIONS—WHEN NECESSARY. A motion for a new trial, and a motion to vacate a judgment, and affidavits in support thereof should be preserved in the record by bill of exceptions. *Anderson* v. *Sloan*, 33; *Kurtz* v. *Simonton*, 70.

4. The copy of a note attached to a declaration and inserted in the transcript of the record by the clerk is no part of the record. It should be embodied in a bill of exceptions. *Cook* v. *Hughes*, 51.

5. JUDGMENT—PARTIAL REVERSAL. A judgment will not be reversed in part or affirmed in part. *Langley et al.* v. *Grill et al.*, 71.

6. BILL OF EXCEPTIONS—DEFECTIVE. If evidence, offered by a defendant to disprove the plaintiff's case, is excluded by the court, the bill of exceptions should contain the evidence given on behalf of the plaintiff, in order that this court may determine the relevancy of the evidence so excluded. *Kinnear* v. *Tucker et al.*, 74.

7. WHEN TO FILE BILL OF EXCEPTIONS. A bill of exceptions, filed in vacation, there being no order of court to authorize it, is no part of the record. *Orman et al.* v. *Kirth et al.*, 82.

8. ERROR MAY BE ASSIGNED ON AGREED CASE. In a case heard on an agreed statement of facts, it is not necessary to move for a new trial in the court below:
Or to preserve the statement of facts in the record by bill of exceptions:
Or to except to the judgment of the court below. *Clayton* v. *Smith*, 95.

9. ERROR—MUST APPEAR OF RECORD. Error cannot be assigned as to matters not of record. *Shallcross* v. *Kretschmer*, 493; *Smith* v. *The People*, 121.

10. COMPUTATION OF TIME. In computing the time allowed by the district court for filing an appeal bond, the day on which the order was made is to be excluded. Appeal bond must be filed within the time allowed by the district court. *Hax et al.* v. *Leis*, 171.

11. DISMISSING WRIT OF ERROR—EFFECT. If plaintiff voluntarily dismiss his writ when his cause is regularly before the court, this will operate to affirm the judgment of the court below. *Wes. Un. Tel. Co.* v. *Graham*, 182.

12. If the writ be dismissed for irregularity therein no such effect will follow. Id.

13. FORMER ADJUDICATION MUST BE PLEADED. Upon motion to dismiss the writ of error, this court cannot determine that the judgment was affirmed on appeal. The former adjudication should be pleaded. *Hax et al.* v. *Leis*, 187.

14. APPEAL—EFFECT OF DISMISSAL UPON THE JUDGMENT. If an appeal is dismissed for the reason that the appeal bond was not filed within the time fixed by the district court, this will not operate to affirm the judgment, and a writ of error may be prosecuted to reverse the same judgment. Id.

15. COSTS DENIED. Where a motion for new trial has not been presented in the time and manner directed by the court, the party in fault will not be allowed costs. *Kinney* v. *Williams*, 191.

16. OBJECTION TO EVIDENCE MUST BE MADE AT THE TRIAL. Objections to evidence cannot be presented for the first time in this court. *Machette* v. *Wanless*, 225; *Deitz* v. *City of Central*, 324; *Mills et ux.* v. *Angela*, 334.

17. MANNER OF PRESERVING OBJECTION, THAT WRITTEN INSTRUMENT HAS BEEN ALTERED AFTER EXECUTION. It was objected to a written instrument when it was offered in evidence, that it had been altered after execution by changing the name of the payee and the date, and the objection was overruled. The instrument not having been attached to the record filed in this court, the ruling of the court below on this point cannot be reviewed. *Cheney* v. *Barber*, 256.

18. COSTS WILL NOT BE ALLOWED TO PARTY IN FAULT. Where the error complained of was occasioned by the negligent act of the attorney for plaintiff in error, costs will not be allowed. *Haskins* v. *Tucker et al.*, 263.

19. DIMINUTION OF RECORD — WILL NOT BE NOTICED IF ERROR APPEAR. A bill of exceptions in the record was not questioned, but it was alleged that another bill of exceptions remained in the court below. Error appearing in the bill of exceptions contained in the transcript on file, a suggestion of diminution of the record will not be noticed. *Jones* v. *Carothers*, 291.

20. ERROR IN ENTERING JUDGMENT. The judgment of the district court, being for the higher offense, was set aside, and the court below was directed to pronounce judgment on the verdict for the misdemeanor specified in the last clause of section 43 of the Criminal Code. *Foster* v. *The People*, 294.

21. WHERE THE CONVICTION WAS PROPER, BUT THE LAW WAS MISAPPLIED. Where the law of the case was misconceived in the court below and the judgment is erroneous, a new trial will be granted, although the evidence was sufficient to warrant a conviction upon two counts in the indictment. *Farnum* v. *U. S.*, 309.

22. MANDAMUS — WHERE THE COURT IS DIVIDED IN OPINION. Upon application for mandamus, if the court is equally divided in opinion, the writ will be denied. *The People* v. *Hallett*, 352.

23. ASSIGNING ERRORS. Errors should be assigned with such particularity as to give information of the objections to the record upon which the plaintiff intends to rely. *Clear Creek Mining Co.* v. *Root*, 374.

24. SERVICE BY PUBLICATION — WHAT EVIDENCE SUFFICIENT. Where the decree recites that there was notice by publication, and the record is not complete, the decree will not be reversed because the certificate of publication is not found in the record. Id.

25. GROUND OF OBJECTION TO TESTIMONY SHOULD BE STATED. If the nature of an objection to testimony is such that, by the production of further testimony, the evidence objected to is susceptible of being made admissible, the particular ground of objection must be stated, and, if it is not stated, a court of review ought to regard the evidence as properly admitted. *Cody* v. *Butterfield*, 378; *Watson* v. *Hahn*, 494; *Consolidated Gregory Company* v. *Raber*, 512.

26. In an action upon a promissory note against a woman, it appeared that she was married previous to the execution of the note, and it did not appear that the note was executed in or about the sole trade or business of defendant, or in relation to her separate estate; and it was urged in this court that, upon these facts, a presumption arises that the marriage existed at the time of the execution of the note, and that the burden of showing that the note was given in relation to the separate business or estate rested upon the plaintiff. These objections, not having been made in the court below, cannot be urged here. *Cody* v. *Butterfield*, 378.

27. PRESUMPTION IN SUPPORT OF RECORD OF COURT OF GENERAL JURISDICTION. Where an attorney made oath that he had no notice of a motion for leave to amend the declaration, and there is no showing whether his clients were notified, in support of the proceedings of the court it will be presumed that notice was served upon the clients. *Good et al.* v. *Martin*, 406.

28. BILL OF EXCEPTIONS — IN TRIAL TO THE COURT WITHOUT A JURY. If a cause is tried to the court without a jury, exception must be taken to the judgment of the court, if the party aggrieved wishes to have it reviewed in this court. *Phelps* v. *Spruance*, 414.

29. In such case a motion for new trial is unnecessary, but the exception to the judgment of the court is indispensable, if that judgment is to be reviewed here. Id.

30. BILL OF EXCEPTIONS — WHEN NECESSARY. Error cannot be assigned as to the damages awarded in the court below, unless the evidence upon which the finding was made is preserved in the record. *Loveland* v. *Sears*, 433.

31. BILL OF EXCEPTIONS, WHEN IT SHOULD BE SIGNED. A bill of exceptions must be signed during the term at which the judgment or opinion excepted to is given, unless a day in vacation is allowed therefor by order of the court. *Murphy* v. *Cunningham*, 467.

32. OBJECTION WAIVED BY JOINING IN ERROR. But if a defendant join in error, he thereby waives the objection that the bill of exceptions was filed in vacation without an order of court, and all matters appearing in the transcript which are esteemed in law to form part of the record, will be considered by the court. Id.

33. NEW TRIAL — PRESUMPTION IN FAVOR OF FINDING. Where an issue of fact is submitted to the judge at *nisi prius*, he performs the functions of both court and jury, and the same presumption must be indulged to sustain his finding as would be made in favor of the verdict of a jury. Id.

34. ERROR IN FORM OF JUDGMENT. If no error appears prior to the verdict, the cause will be remanded, with leave to plaintiff to move the court below for the proper judgment. *Anderson et al* v. *Sloan*, 33.

35. CERTIORARI FOR LOST RECORDS. Certiorari will not be issued to bring up matter, not of record, in the court below.

Where a bill of exceptions has been lost from the files of the court below certiorari cannot be issued to bring up the record of such bill until the loss has been supplied. *Clements* v. *Hahn*, 490.

36. PRESUMPTION IN FAVOR OF JUDGMENT BELOW. Where the bill of exceptions does not contain all of the evidence given in the trial in the court below, the court will presume that the finding of the district court is correct. *Watson* v. *Hahn*, 494; *Kinnear* v. *Tucker*, 74; *Cook* v. *Hughes*, 51.

37. REMOVAL OF RECORDS INTO SUPREME COURT. This court will not take cognizance of questions, arising in a criminal cause, which are brought into this court from a district court by agreement of parties. *The People* v. *Myers*, 508.

38. WHERE JUDGMENT HAS BEEN TAKEN FOR A GREATER SUM THAN THE AD DAMNUM. If judgment is obtained for an amount exceeding the damages laid in the declaration, the plaintiff in the judgment may remit the excess and take judgment in this court for the amount claimed in his declaration.

COSTS — WHEN PLAINTIFF BELOW HAS TAKEN JUDGMENT FOR TOO LARGE AN AMOUNT. In such case appellant will be allowed costs in this court. *Consolidated Gregory Co.* v. *Raber*, 582.

39. APPEAL BOND. If several defendants pray an appeal jointly, and the bond is executed by one only, it is not amendable. *Andre* v. *Jones*, 489.

40. APPEAL. Will not lie from interlocutory order. *Armor* v. *Lyon et al.*, 7.

41. APPEAL. Will not lie from probate to district court. *Cass* v. *Davis*, 43.

42. In quo warranto proceeding. *Pollock et al.* v. *The People*, 83.

43. APPEAL. Must be prayed for within three days after judgment. *Freas* v. *Townsend*, 86.

44. DAMAGES FOR DELAY. Where a writ of error was prosecuted for delay, twenty per cent of the amount of the judgment was awarded to the defendant in error. *Shallcross* v. *Kretschmer*, 493.

45. JUDGMENT UPON DEMURRER — SUFFICIENCY. Where two demurrers to the declaration were on file, and the judgment of the court refers to the said demurrer, without specifying either of them, it will be presumed that the court passed upon both of them. *Watson* v. *Hahn*, 385.

46. JUDGMENT — WHAT SHALL BE REGARDED AS FINAL. Where the court below has awarded execution, this court will entertain a writ of error to reverse the judgment, although the record of such judgment is defective. *Hoehne* v. *Trugillo*, 161.

PRINCIPAL AND AGENT:

1. AGENT — AUTHORITY OF CLERK IN A STORE. A clerk left in charge of a store during the absence of his principal, with instructions to do the best

he can, has no authority to sell the entire stock valued at upwards of $10,000, to a single creditor of his principal to satisfy a debt of less than $7,000. *Berry* v. *Hart et al.*, 246.

2. AGENT'S AUTHORITY — MAY BE ATTACKED BY CREDITOR OF THE PRINCIPAL. A creditor of the principal may attack a sale made by an agent, upon the ground that the agent was without authority to make it, but a mere stranger cannot be allowed to interfere between principal and agent.

THE CREDITOR MUST PROVE A DEBT and legal process against the principal in the same manner as one who seeks to avoid a sale under the statute of frauds and for the same reason. Id.

3. AGENTS — WHAT SIGNATURE WILL BIND PRINCIPAL. If an agent sign a bill of exchange in this form, "T. R. T., agent for S. T.," and there is nothing in the body of the bill evincing an intention to bind the principal, the agent shall be regarded as the drawer of the bill. *Tannett* v. *R. M. Nat. Bank*, 278.

4. ATTORNEY IN FACT — TO EXECUTE APPEAL BOND. If authority is given by statute to the president of a school district to execute an appeal bond on behalf of the district, the district may nevertheless confer the same authority upon its secretary. A party may have several agents appointed to do the same thing. *School District No. 8 Jefferson Co.* v. *Erskin*, 367.

5. AGENT — WHO IS CHARGED AS PRINCIPAL MUST SHOW PREVIOUS AUTHORITY. In an action against T. to recover the price and value of certain goods alleged to have been purchased by him, the defendant alleged that he purchased the goods for B. and as his agent; but there was nothing to show that B. had given to T. authority to purchase such goods. *Held*, that the defense was not made out. *Tiger* v. *Lincoln et al.*, 394.

6. DEED BY HUSBAND, WITHOUT WIFE, UNDER POWER FROM BOTH. A deed conveying the husband's land, executed in the name of the husband only, by an attorney in fact, under a power proceeding from the husband and wife, is as effectual as if the wife had joined therein.

POWER OF ATTORNEY — CONDITIONS IMPOSED ON ATTORNEY. In an authority to convey lands, the principal may impose frivolous and impertinent conditions upon his attorney, and, if the conditions are merely indifferent, and not *malum prohibitum* or *malum in se*, his will shall be observed.

POWER OF ATTORNEY — CONDITION AGAINST PUBLIC POLICY. It is against public policy that land records should be incumbered by invalid conveyances purporting to be executed by persons incapable in law, and so holding out empty promises.

A POWER OF ATTORNEY, executed by husband and wife, which confers authority to convey lands of the husband, in so far as it requires that the conveyance shall be made in the name of the wife, imposes a condition which the law will not suffer the attorney to perform.

POWER OF ATTORNEY — ILLEGAL OR VOID CONDITION. An illegal or void condition inserted in a warrant of attorney may be disregarded by the attorney.

POWER FROM HUSBAND AND WIFE TO SELL HUSBAND'S ESTATE — HOW EXECUTED. A power proceeding from husband and wife, as to the estate of the husband, is well executed in his name alone. *Holladay* v. *Dailey*, 460.

7. AGENT OF MINING COMPANY — EXTENT OF AUTHORITY. An agent of a mining company may employ laborers in the business of the company, but he cannot pledge the faith of the company to persons not so employed. *Consolidated Gregory Company* v. *Raber*, 511.

8. If an agent of a mining company employ a person to take care of a team which does not belong to the company, used by such agent while attending to the busines of the company, and also while attending to the business of other parties for whom the agent is acting, such employment is beyond the scope of the agent's authority, and the company is not liable for the wages of the person so employed. Id.

9. AGENT — AUTHORITY OF ENGINEER OF RAILWAY COMPANY. An engineer of a railway company, as such, has no authority to pledge the company to pay indebtedness due from a contractor, who is engaged in building the road, to one of his employees. *Powrie* v. *Kansas Pacific Railway Co.*, 529.

10. PRINCIPAL — NOT BOUND WHERE AGENT EXCEEDS HIS AUTHORITY. P., who was employed by R., a contractor on a railroad, proposed to discontinue work on account of R.'s inability to pay him. Thereupon G., an engineer of the railway company, stated that if the men, of whom P. was one, would go on and complete the work, the company would see them paid.

There being nothing to show that the engineer was authorized to make such promise, an action against the company will not lie thereon. Id.

11. AGENT OF MINING COMPANY — AUTHORITY. A superintendent of a mine, with authority to take ore therefrom, and crush it for the purpose of obtaining gold, cannot, upon such authority, borrow money in the name of his principal. *Union Gold Mining Co.* v. *R. M. Nat. Bank*, 532.

12. CORPORATION — PRESUMPTION AS TO OFFICER'S ACTS. The president of a corporation cannot put off his official character at will and deny to those who have business with the corporation, access through him. While acting upon the business of the corporation, all his acts, within the scope of his authority as president, must be regarded as official. Id.

13. AGENT — AUTHORITY OF PRESIDENT OF A CORPORATION. An undertaking of a president of a corporation to bring before the board of directors, at a time specified, a demand against the corporation for money borrowed by an agent of the corporation, is within the scope of his authority as president, and the corporation is bound to consider the demand at the time specified. Id.

PRINCIPAL AND SURETY:

SURETY IN APPEAL BOND CANNOT REQUIRE OBLIGEE TO PROCEED AGAINST HIS PRINCIPAL. In an action on an appeal bond, a plea by a surety in the bond that execution has not been sued out on the judgment from which the appeal was taken is bad. *Anderson et al.* v. *Sloan*, 484.

PROCESS:

See SERVICE AND RETURN OF PROCESS.

REASONABLE DOUBT:

See CRIMINAL LAW, 4.

RECORD.

1. VERDICT OF JURY. A copy of the verdict of a jury, inserted in the transcript of the record, will not be received to contradict the record of the verdict given in the proceeding of the court. *Langley et al.* v. *Grill et al.*, 71.

2. CONSTRUCTION OF THE WORD "DEFENDANTS." The word "defendants," used in the record of a judgment in a cause where there are two defendants, will be regarded as referring to both of them, although one of them has not been served with process. Id.

3. COMMON LAW — HOW CONSTITUTED. At common law the testimony of witnesses, the opinions of the court upon questions of evidence, the charge of the court to the jury, and other incidents attending the trial of a cause, did not appear in the record. *Smith* v. *The People*, 121.

4. BILL OF EXCEPTIONS IN CRIMINAL CAUSE. A statute of this territory (4 Sess. 92) makes it the duty of a judge to sign and seal a bill of exceptions in a criminal cause, when tendered to him, and provides that such bill of exceptions shall be filed by the clerk, and shall become a part of the record of such cause. Id.

5. RECORD OF EXCEPTIONS — HOW MADE. Exceptions to the rulings, opinions and decisions of the court form no part of the record until they are reduced to writing, and signed and sealed by the judge. Id.

6. RECORDS OF PROBATE COURTS. A mere minute or memorandum of a proceeding is not a record. An entry in the following form, "judgment given by default, by order of the court," is not a judgment. *Hoehne* v. *Trugillo*, 161.

7. RECORD OF DEFENDANTS' APPEARANCE AT TRIAL. Where the record recites that the defendants appeared at the trial, the presumption is that all were present who had been served with process. *Anderson et al.* v. *Sloan*, 485.

8. FORMER RECOVERY — CONCLUSIVE. In an action of replevin it appeared that the property in dispute had been the subject of another suit, and the record of that suit being introduced in evidence, a verdict contrary to the judgment in the first suit will not be sustained. *Carothers* v. *Jones*, 196.

REDEMPTION FROM SALE UNDER EXECUTION:

See JUDICIAL SALES, 2.

REPLEVIN:

1. WRONGFUL TAKING — DEMAND AND REFUSAL. In replevin it is necessary to show a wrongful taking or detention of the property in controversy, and it is erroneous to instruct the jury that the only matter in dispute is the ownership of the property. *Sopris* v. *Truax*, 89.

2. BY MORTGAGE OF CHATTELS — EVIDENCE OF INDEBTEDNESS. A mortgagee of chattels may proceed against the mortgaged property while he holds any portion of the indebtedness secured by the mortgage, and in replevin for such chattels it is sufficient for him to show that he holds some portion of the indebtedness secured by the mortgage. *Machette* v. *Wanless*, 225.

3. WILL NOT LIE FOR TAKING WITHOUT DETENTION. Under the statute the action of replevin, whether in the *cepit* or *detinet* lies, as at common law, only for the recovery of goods *in specie*, and a mere unlawful taking, not followed by detention, will not suffice to maintain it. *Paul* v. *Luttrel*, 317.

4. IN DETINET — DEMAND AND REFUSAL. In replevin against one who has acquired the property replevied in good faith, it is necessary to prove a demand before suit brought or something equivalent to it. *Roach* v. *Binder*, 322.

5. DEMAND AND REFUSAL. It is not necessary that a defendant in replevin should expressly refuse to comply with a demand for property. If he neglect to deliver it and contest the suit, he cannot, after verdict, be permitted to say that he intended to avoid litigation by surrendering the property before suit. *Howard* v. *Sherwood*, 117.

6. DEFENSE ARISING AFTER SUIT BROUGHT. In an action of replevin by a mortgagee to recover possession of the chattels mortgaged, the defendant cannot defeat the action by showing that a portion of the indebtedness mentioned in the mortgage has been paid. *Machette* v. *Wanless*, 225

7. PLEADING IN REPLEVIN — FRAUD. The rule which requires that fraud be specially pleaded does not apply to the action of replevin. *Sopris* v. *Truax*, 89.

8. PLEADING IN REPLEVIN — DETENTION OF PROPERTY MAY BE PUT IN ISSUE. The detention of the goods is a material fact, necessary in either form of action to maintain the plaintiff's case, and may always be put in issue, either by the plea of *non detinet*, or, perhaps by the plea of *non cepit*, where the plaintiff declares in the *cepit* or by special plea. *Paul* v. *Luttrell*, 317.

SERVICE AND RETURN OF PROCESS:

1. SERVICE OF ATTACHMENT — HOW MADE. The statute regulating the service of writs of attachment requires the sheriff to read the writ to the defendant named therein, or to deliver to him a true copy thereof, and personal service cannot be obtained except in one of these ways. *Crary* v. *Barber*, 172.

2. IN SERVING A WRIT OF ATTACHMENT a sheriff cannot substitute his own language for that of the writ, or cull from the writ such facts as he believes to be material for the information of the defendant, but the language of the writ must be used. Id.

3. A RETURN TO A WRIT OF ATTACHMENT — That the name of the plaintiff, the amount claimed, and when and where the defendant was to answer the complaint of the plaintiff was read to the defendant, is not sufficient. Id.

4. SHERIFF'S RETURN — AMENDMENT OF. A sheriff may amend his return to a summons by leave of the district court, after the record of the cause has been removed into this court. *Anderson* v. *Sloan*, 33; *Loveland* v. *Sears*, 433.

5. ATTACHMENT WRIT, WHICH RECITES NO CAUSE, IS IRREGULAR. That the defendants reside out of the county is no ground for issuing an attachment, and a writ, in which this is recited as the cause of attachment, is irregular on its face. *Nachtrieb* v. *Stoner*, 424.

6. JURISDICTION — SERVICE OF PROCESS. It is error to enter judgment against parties who have not been served with process. *Dorsett* v. *Crew*, 18; *Langley et al.* v. *Grill et al.*, 71.

7. SERVICE OF PROCESS MUST BE SHOWN BY THE RECORD. The record must show that the defendant was duly notified of the proceedings against him, or that he appeared in the district court. *Crary* v. *Barber*, 172.

8. SHERIFF'S RETURN. A return to a summons, "I have duly served the within by reading the same to the within-named John C. Bruce and John H. Langley, not found in my county, as I am therein commanded," is ambiguous, and should not be received. *Langley et al.* v. *Grill et al.*, 71.

SPECIFIC PERFORMANCE OF CONTRACT:

1. SPECIFIC PERFORMANCE — TITLE TO LAND. A vendor who seeks specific performance of a contract for a sale of land must, in his bill of complaint, set forth his readiness and ability to make a good title to the land.

DECREE SHOULD EXTEND TO THE WHOLE CONTRACT. Upon bill by vendor against vendee to enforce specific performance of contract for sale of land, the defendant cannot be required to pay the purchase-money, or, in default thereof, to surrender the contract to be canceled, except upon the condition that the complainant convey the land to him.

POSSESSION OF LAND OBTAINED UNDER CONTRACT OF PURCHASE. Where a vendee of land has obtained possession from the vendor under a contract of purchase, if he refuses to pay the purchase-money, and accept the vendor's title, he must surrender the possession. And this although the vendor has not a good title. *Gilpin* v. *Watts*, 479.

2. PRACTICE IN CHANCERY — BILL TO ENFORCE VENDOR'S LIEN — DECREE. A contract for the sale of land was made, but the land was not conveyed. Upon bill filed by the vendor to enforce a lien for the purchase-money, it was error to decree a sale of the land. The proper practice in such case is to require the vendee to pay the money due upon the contract within a specified time, or in default thereof that he be foreclosed of all equity of redemption in the premises. *Todd et al.* v. *Simonton*, 54.

STAMPS:

1. NEED NOT BE CANCELED. An instrument which has been stamped according to the revenue laws of the United States may be read in evidence, although the stamp thereon has not been canceled.

CONSTRUCTION OF THE ACT RELATING TO. Whether an instrument is admissible in evidence, under the act of 1864, is to be determined by section 163 of that act as amended (14 Statute at Large, 143). *Patterson* v. *Gile*, 200.

STATIONERY:

See STATUTES, CONSTRUCTION, 11.

STATUTES — CONSTRUCTION:

1. MECHANICS' LIEN ACT OF 1861. The act of 1861, relating to mechanics' liens (1 Sess. 258), is not retrospective. *Townsend et al.* v. *Wild et al.*, 10.

2. CONSTRUCTION OF SECTION 3 OF ACT OF CONGRESS OF 1790, RELATING TO CRIMES. The territory of Colorado is not a place or district of country under the sole and exclusive jurisdiction of the United States within the meaning of section 3 of the act of congress of 1790. 1 Statute at Large, 113. *Franklin* v. *U. S.*, 35.

3. STATUTE REPUGNANT TO ORGANIC ACT. Sections 4, 5, 6 and 7 of the act of 1855, relating to probate courts (4 Sess. 98), which provide for appeals from probate to district courts, are repugnant to the Organic act, and therefore inoperative and void. *Cass* v. *Davis*, 43.

4. STATUTE INOPERATIVE. The thirteenth section of the act of 1861 (1 Sess. 71), concerning licenses, was never effectual for any purpose. *Paton* v. *The People*, 77.

5. LICENSE — GENERAL LAW NOT AFFECTED BY CHARTER OF BLACK HAWK. The act incorporating the city of Black Hawk, and conferring power upon the authorities of that city to license the sale of spirituous liquors (3 Sess. 228), does not affect the act of 1861 (1 Sess. 69) as amended, which confers like power upon the board of county commissioners. Id.

6. CONSTRUCTION OF REVENUE LAW OF 1864. As to contracts made after the law of June 30, 1864 (13 Stat. at Large) was passed, the law will presume that the two and one-half per centum, mentioned in section 103 of that act, is included in the rate specified in the contract, and a carrier of goods for hire cannot recover the tax in addition to the contract price. *Clayton* v. *Smith*, 95.

7. ACT REPEALED. The act of 1864 (3 Sess. 102), relating to mechanics' liens, was repealed by the act of 1867 (6 Sess. 75) upon the same subject. *Woodbury et al.* v. *Grimes et al.*, 100.

8. KANSAS TERRITORY, LAWS OF, RELATING TO DESCENT OF REAL ESTATE. In November, 1860, there were three statutes in Kansas relating to the descent of real estate. By the first the widow had one-half the real estate of her deceased husband, the other half going to the children of the marriage and of the husband. By the second, she had one-half in value of the realty to be set apart to her under the direction of the court. By the third, she was endowed of the third part of all the lands whereof her husband was seized, of an estate of inheritance during coverture. She was required to elect between these acts within six months after the death of her husband. *Crandall* v. *Sterling Gold Mining Co.*, 106.

9. ELECTION — EFFECT OF WIDOW'S FAILURE TO MAKE. In ejectment by a widow claiming as heir to her deceased husband's estate, under the first of the acts mentioned, it did not appear that she had declared her election to take under that statute within the time prescribed. *Held*, that she could not recover. Id.

10. RECORD — BILL OF EXCEPTIONS — STATUTE OF WESTMINSTER. The statute of Westminster which gave the bill of exceptions had no application to criminal causes. *Smith* v. *The People*, 121.

11. MEANING OF THE WORD "STATIONERY." Blanks used by a clerk of a district court are not stationery within the meaning of section 28, chapter 21, Revised Statutes, and the county is not liable for them. *Board of Co. Com.* v. *Koons et al.*, 160.

12. MILITARY RESERVATION — LAWS OF TERRITORY OPERATE WITHIN. An indictment and conviction under chapter 53, Revised Statutes, for selling spirituous liquor without license, at and within the military reservation of Fort Lyon, is good. *Reynolds* v. *The People*, 179.

13. CONSTRUCTION OF THE ACT RELATING TO STAMPS. Whether an instrument is admissible in evidence, under the act of 1864, is to be determined by section 163 of that act as amended (14 Statute at Large, 143). *Patterson* v. *Gile*, 200.

14. CONSTRUCTION OF SECTION 43 OF CRIMINAL CODE, RELATING TO MAYHEM. The effect of the proviso in section 43 of the Criminal Code (Rev. Stat. 202) is to reduce the crime in certain specified cases from a higher to a lower grade. *Foster* v. *The People*, 293.

15. CONSTRUCTION OF SECTION 12, ACT OF 1864 — WHAT IS AN OFFENSE BY MAIL CARRIER. A mail carrier who secretes, embezzles or destroys a letter, packet, bag or mail of letters intrusted to him to be carried, offends against the first clause of section 12 of the act of 1864 (13 Stat. at Large, 336), and if the letter, packet, bag or mail of letters contain any article of value, he offends against the last clause of that section. *Farnum* v. *U. S.*, 309.

16. TRUST — TOWN SITE — UNDER LEGISLATIVE CONTROL. Under the act of congress of May 23, 1844 (5 Stat. at Large, 657), and the amendatory act of May 28, 1864 (13 Stat. at Large, 94), the execution of the trust is under the sole and exclusive direction of the legislative assembly. *City of Denver* v. *Kent*, 337.

17. STATUTE — REPUGNANT TO ACTS OF CONGRESS. Section 6 of the act of the assembly of 1866 (5 Sess. 88), by which unclaimed lots were granted to the city of Denver for the use of common schools, is repugnant to the acts of congress relating thereto, and therefore void. Id.

18. DENVER TOWN SITE — TITLE TO. When title was acquired to the town site of Denver, under the act of May 28, 1864 (13 Stat. at Large, 94), the prior act of the legislative assembly of the territory (3 Sess. 139), came into effect and governed the trustee in the disposal of lots within the town site. *Cofield* v. *McClellan*, 370.

19. LEGISLATIVE POWER — AUTHORITY OF DISTRICT COURTS TO APPOINT SPECIAL TERMS. The statute (ch. 25, sec. 9, Revised Statutes, 267) which confers authority upon district courts to appoint special terms of such courts is valid. *Kopfer* v. *Keller*, 410.

20. CONSTRUCTION OF SECTION 29 OF NATIONAL BANK ACT. Section 29 of the act relating to national banks contains a direction respecting the management of associations organized under the act, and it is not a limitation upon the powers of such associations. *Union Gold Mining Co.* v. *R. M. Nat. Bk.*, 532.

21. PROMISSORY NOTE — UNDER THE STATUTE OF THIS TERRITORY the assignor of a promissory note cannot be made liable to the assignee upon notice of dishonor by the maker merely. *Watson* v. *Hahn*, 386.

22. CONSTRUCTION of the act of 1870, relating to homicide. *Hill* v. *The People*, 436.

23. ORDINANCES OF CITY — WHEN REASONABLE. Where authority was conferred upon a corporation to suppress and prohibit the sale of intoxicating drinks, as well as to license the same, an ordinance which imposes a penalty for selling such drinks without license, which penalty exceeds that fixed by the general law of the territory, is reasonable. *Deitz* v. *City of Central*, 323.

24. LEGISLATIVE POWER — TO CHANGE THE OFFICIAL TITLE OF A JUSTICE OF THE PEACE. The legislative assembly has no power to confer upon a justice of the peace a denomination not warranted by the organic act, and, in so far as the charter of the City of Central confers upon the justice of the peace exercising jurisdiction under the ordinances thereof, the name of police magistrate, it is void. Id.

25. KANSAS TERRITORY — LAW OF, NOT IN FORCE HERE. A lien upon the premises benefited cannot be asserted under the mechanics' lien law of the late territory of Kansas. *Townsend et al.* v. *Wild et al.*, 10.

26. EFFECT OF REPEAL OF MECHANIC'S LIEN LAW. Liens existing under the act of 1864 fell when that act was repealed, unless within the saving clause of the 28th section of the act of 1867. *Woodbury et al.* v. *Grimes et al.*, 100.

TENDER:

See COSTS, 1.

TELEGRAPH COMPANIES:

See CORPORATIONS, 1, 2.

TERMS OF COURT:

LEGISLATIVE POWER — AUTHORITY OF DISTRICT COURTS TO APPOINT SPECIAL TERMS. The statute (ch. 25, sec. 9, Revised Statutes, 267) which confers authority upon district courts to appoint special terms of such courts is valid. *Klopfer* v. *Keller*, 410.

TOWN SITE:

See TRUSTS AND TRUSTEES.

TRESPASS:

1. QUARE CLAUSUM — EVIDENCE OF POSSESSION. In trespass *quare clausum*, if the plaintiff does not show title, he must show that he was in possession of the *locus in quo* at the time of the alleged injury. *Sullivan et al.* v. *Clements*, 261.

2. In trespass *de bonis* by a vendee of goods against creditors of the vendor, who have taken the goods in attachment, the latter cannot show that an agent who made the sale acted without authority from the vendor, unless they also show a debt due from the vendor to them. *Deitsch* v. *Wiggins et al.*, 299.

3. POSSESSION IN TRESPASS DE BONIS. In trespass *de bonis* the plaintiff must show that at the time of the alleged trespass he was in possession of the property, or that he had the right to the possession, and an outstanding possession in a third person, with the right to retain it until the payment of indebtedness or the happening of some other event will defeat the plaintiff's action. *Nachtrieb* v. *Stoner*, 424.

4. AGAINST PLAINTIFF IN ATTACHMENT — WHEN PROCEEDINGS IRREGULAR. Where the proceeding was before a justice of the peace, the cause of attachment set out in the affidavit was insufficient, and it was stated in the writ that the defendants reside out of the county; the plaintiff who procured the writ, the justice of the peace who issued it, and the officer who executed it, are liable to the defendants in trespass. Id.

5. THE AFFIDAVIT BEING DEFECTIVE, the rule is not affected by the power of amendment given by statute, for the court does not know that the facts exist upon which a proper affidavit may be made.

If the affidavit had been sufficient, and the writ had falsely recited it, the court might incline to a different opinion. Id.

6. JUSTIFICATION UNDER PROCESS OF INFERIOR COURT. Whoever justifies or asserts any right under the sentence or judgment of a court of

inferior jurisdiction ought to be required to show the substantial regularity of its proceedings at every step. Id.

7. PLEADING IN TRESPASS — JUSTIFICATION BY OFFICER. In trespass *de bonis* against an officer, if he justify under a writ of attachment, he must aver return of the writ.

SAME — JUSTIFICATION BY PLAINTIFF IN ATTACHMENT. But this rule is not applicable to the plaintiff in the attachment suit. *Berry* v. *Hart et al.*, 246.

8. TRESPASS — PLEA OF JUSTIFICATION. In trespass *de bonis* against an attaching creditor who justifies under the writ he must aver and prove a debt due from the attachment defendant to him.

PLEA OF JUSTIFCATION MUST BE SPECIAL. In trespass *de bonis* the defense that the goods were taken under attachment against a third person is not admissible under the general issue. *Deitsch* v. *Wiggins et al.*, 299.

TROVER:

DEMAND AND REFUSAL. In an action of trover, proof of demand and refusal is made for the purpose of showing a conversion of the property by defendant, and, when the plaintiff is able to show such fact by other evidence, he need not resort to such proof. *Turner* v. *Hahn*, 23.

TRUSTS AND TRUSTEES:

1. TRUST — TOWN SITE — WHO ARE BENEFICIARIES. Portions of the town-site of Denver, not subject to individual claim, are held by the trustee for the use and benefit of the community at large.

TRUST — UNAUTHORIZED SALE BY TRUSTEE. A sale by the trustee of any portion of the town-site of Denver, not according to the rules and regulations prescribed by the legislative assembly, is wholly unwarranted and absolutely void.

TRUST — DUTY OF TRUSTEE. In the absence of authority to sell any portion of the town site of Denver, it was the duty of the trustee to await the action of the legislative assembly.

TRUST — ABUSE BY TRUSTEE — WHO MAY BRING SUIT. The city of Denver, in its corporate capacity, may institute and maintain suits to set aside sales of unclaimed lots made by the trustee of the town site of Denver, without authority of law, and may keep watch over the property until the legislature shall authorize the sale thereof.

TRUST — TOWN SITE — DISPOSITION OF ESTATE. The legislative assembly has power to direct the sale of unclaimed lots in the city of Denver, and may apply the proceeds of such sales to the erection of public buildings for the use of the city, or for the support of its public schools, or any other general purpose that will conduce to the interests of the community. *City of Denver* v. *Kent et al.*, 337.

2. TERRITORIAL ACT — REGULATING EXECUTION OF TRUST. The provision of the fourth section of the act of the territorial assembly, requiring claimants of land within the town site to assert their claims within ninety days after notice of the entry, was as to claims and rights existing at the date of the entry dictated by public interest and clearly within the power delegated by congress to the territorial legislature. *Cofield* v. *McClellan*, 370.

3. By the act of congress the regulation of the details of executing the trust was entirely remitted to the territorial legislature, and it was eminently proper that in the very threshold they should fix a period within which the claim of every beneficiary should be asserted. Id.

4. Every person who, in virtue of an occupancy or improvement existing at the date of the entry of the town site or prior thereto, seeks to bring in question the right of one holding by conveyance from the trustee, must show affirmatively a compliance on his part with the requirements of the fourth section of the act of assembly, or at least must excuse his failure to comply therewith. Id.

5. FAILURE TO OBSERVE — SECTION FOUR OF ACT OF ASSEMBLY. Where a bill was filed against one who had obtained title, under the act of congress and of the territorial assembly, to a lot in the city of Denver, by one who claimed title to the same lot which accrued in the year 1859, to have the defendant declared a trustee for the benefit of the complainant, and it was not averred that the complainant or his grantors had filed a declaratory

statement, as required by the fourth section of the act of the assembly, the relief was denied. Id.

VARIANCE:

1. VARIANCE, HOW REACHED. A variance between the writ and declaration cannot be reached by demurrer. It is matter for plea in abatement. *Phelps* v. *Spruance*, 414.

2. PLEADING — VARIANCE MAY BE ALLEGED UNDER NON EST FACTUM. In debt on a promissory note, the defendant may take advantage of a misdescription of the note under the plea of *non est factum*. *Peddle* v. *Donnelly*, 421.

See PLEADING AND EVIDENCE, 14, 16.

VERDICT:

1. EXCESSIVE. Where the verdict of the jury was for $221.66, and was expressed to be for the amount of a note, without interest, and it appeared that the note was for $221 only: *Held*, that it was error to receive and enter judgment on the verdict. *Dorsett* v. *Crew*, 18.

2. IN REPLEVIN — SUFFICIENCY. If the jury find the issues for the plaintiffs, and assess their damages at $10, probably the verdict would not answer all issues in an action of replevin; but it is sufficient to determine some issues in that action, as, for instance, an issue joined upon plea of property in defendant or a stranger. *Sears* v. *Andrews et al.*, 88.

3. Where there are no written pleadings, and the record does not disclose the issue tried, the verdict being sufficient as to some issues which may arise in that form of action, the court will presume that it is responsive to the issue which was tried. Id.

4. VERDICT OF GUILTY — SUFFICIENCY. Upon an indictment for murder a verdict of guilty is a conviction of the offense charged in the indictment. *Smith* v. *The People*, 121.

5. ON ISSUES IN TROVER AND REPLEVIN — SUFFICIENCY. Issues upon plea of *non detinet* and property in defendant in replevin, and upon plea of not guilty in trover, are not determined by a verdict of guilty. *Machette* v. *Wanless*, 225.

6. VERDICT OF GUILTY — A CONVICTION OF THE INFERIOR OFFENSE UPON INDICTMENT FOR MAYHEM. The evidence being clear that the prisoner bit off the ear of the prosecuting witness during a fight between them, assuming that the jury intended to find that the fight was by consent, which is the view most favorable to the prisoner, the verdict is still sufficient for the misdemeanor defined in the last clause of the proviso to section 43. *Foster* v. *The People*, 294.

7. IN AN ACTION OF DEBT TO RECOVER A PENALTY. In such action a verdict of guilty is substantially responsive to the issue. *Deits* v. *City of Central*, 324.

8. WHAT WILL BE SUFFICIENT. A verdict which answers all the issues is sufficient. *Phelps* v. *Spruance*, 414.

9. RECORD OF VERDICT OF JURY. A copy of the verdict of a jury, inserted in the transcript of the record, will not be received to contradict the record of the verdict given in the proceedings of the court. *Langley et al.* v. *Grill et al.*, 71.

WITNESS:

1. COMPETENCY OF PAYEE, IN ACTION AGAINST INDORSER AS MAKER. In an action by the assignee of a note against one whose name appears on the back of the note, charging him as maker, the payee of the note is a competent witness. *Good* v. *Martin*, 165.

2. PREJUDICE OR BIAS. A witness cannot be asked whether he is indebted to one of the parties to the suit, for the purpose of showing the disposition of his mind toward such party. *Union Gold Mining Co.* v. *R. M. Nat. Bk.*, 532.

WRIT OF ERROR:

1. WILL NOT LIE FROM INTERLOCUTORY JUDGMENT. An appeal or writ of error will not lie from an interlocutory judgment. *Andrews* v. *Loveland et al.*, 8; *Armor* v. *Lyon*, 7.

2. JUDGMENT — WHAT SHALL BE REGARDED AS FINAL. Where the court below has awarded execution, this court will entertain a writ of error to reverse the judgment, although the record of such judgment is defective. *Hoehne* v. *Trugillo*, 161.

3. SECOND WRIT. Where a writ was dismissed for want of a cost bond a new writ may be prosecuted in the same cause. *Western Union Telegraph Co.* v. *Graham*, 183.

4. JUDGMENT — WHAT IS FINAL. A judgment in favor of interpleading claimants in an attachment suit is final, and the plaintiff in attachment may prosecute a writ of error to reverse such judgment. *Doane et al.* v. *Glenn et al.*, 418.

5. WRIT OF ERROR — NEW SUIT. A proceeding by writ of error to reverse a decree of a district court in a new suit. *Wise et al.* v. *Brocker*, 550.

6. JURISDICTION OF SUPREME COURT. This court cannot give judgment in a criminal cause, certified into this court from a district court, without writ of error. *The People* v. *Myers*, 508.

7. DISMISSING WRIT OF ERROR — EFFECT. If plaintiff voluntarily dismiss his writ when his cause is regularly before the court, this will operate to affirm the judgment of the court below. If the writ be dismissed for irregularity therein no such effect will follow. Where a writ was dismissed for want of a cost bond a new suit may be prosecuted in the same cause. *Western Union Telegraph Co.* v. *Graham*, 182.